Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

THE AEROSPACE CORPORATION,

Petitioner,

vs.

FRED D. CAMPBELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. §§ 1001, *et seq.*, preempts an independent state law claim for punitive damages based on an employer's alleged motive to terminate an employee in malicious disregard of the employee's right to ERISA-covered benefits.

2. Whether § 502(a) of ERISA, codified at 29 U.S.C. § 1132(a)(1), permits the recovery of extracontractual damages, including punitive damages, to redress the violation of rights recognized by ERISA.

PARTIES TO THE PROCEEDING

The Complaint initially filed by respondent Fred D. Campbell ("Campbell") named as defendants The Aerospace Corporation ("Aerospace"), Arthur J. Schiewe ("Schiewe") and Jean Breedlove ("Breedlove"). On April 7, 1993, and February 15, 1994, respectively, Campbell voluntarily dismissed Schiewe and Breedlove as named defendants. For reasons unknown to Petitioner, the United States Court of Appeals for the Ninth Circuit included Schiewe in the caption of its published decision.

The caption of the case contains the names of the remaining parties to this proceeding, Campbell and Aerospace. Aerospace has no parent company or companies, nor does it have any subsidiaries, whether wholly owned or otherwise.

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INTRODUCTION

Petitioner, The Aerospace Corporation ("Aerospace"), a California non-profit corporation, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Fred D. Campbell v. The Aerospace Corporation*; *Arthur J. Schiewe*, 123 F.3d 1308 (9th Cir. 1997) (Appendix filed herewith ("App."), Exhibit A). The opinion of the District Court in *Fred D. Campbell v. The Aerospace Corporation, et al.*, Civ. No. CV-92-01957 DT, is not published, but the District Court's Memorandum of Decision and Findings of Fact and Conclusions of Law are included in the accompanying Appendix (App. B and C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was entered on September 3, 1997 (App. F). The Ninth Circuit denied a timely petition for rehearing on October 22, 1997 (App. G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974 ("ERISA") at § 510 provides that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a

> participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 U.S.C. § 1140.

Section 502 of ERISA sets forth ERISA's remedial provisions:

> (a) Persons empowered to bring a civil action. A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . .
>
> * * *
>
> (e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(a)(1).

Section 514(a) of ERISA describes the preemptive scope of ERISA's provisions:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)].

29 U.S.C. § 1144(a).

Title 28 U.S.C. § 1331 provides that:

> The district court shall have original jurisdiction of all civil actions arising under the Constitution laws, or treaties of the United States.

It is also recognized that actions subject to removal from state to federal court include:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

28 U.S.C. § 1441(b).

Finally, the doctrine of pendent or supplemental jurisdiction provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

STATEMENT OF THE CASE

This Petition presents two issues of exceptional importance. The first is whether the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. §§ 1001 *et seq.*,

preempts an employee's independent state law claim for punitive damages based on an employer's alleged bad faith in terminating the employee in conscious disregard of the employee's right to ERISA-covered benefits. If such a claim is preempted, the second issue for consideration by the Court is whether a claimant may recover punitive damages for such conduct.

Respondent Fred D. Campbell ("Campbell") was terminated from his employment as a manager at Aerospace for engaging in acts of sexual harassment and conducting personal business on Aerospace time. Claiming that his termination was "wrongful," on February 25, 1992, Campbell filed a Complaint for Damages ("Complaint") in the Superior Court for the State of California for the County of Los Angeles alleging that the termination of his employment with Aerospace gave rise to the following causes of action: (1) tortious discharge in violation of public policy; (2) breach of an implied contract of continued employment; (3) breach of the implied covenant of good faith and fair dealing; (4) age discrimination in violation of California Government Code § 12941(1); (5) common law age discrimination; and (6) defamation.

In support of the first claim for relief for tortious discharge in violation of public policy, Campbell expressly alleged as his basis for the recovery of punitive damages that Aerospace had terminated his employment in malicious disregard of his right to ERISA-covered benefits. Specifically, Campbell alleged in Paragraph 10 of the Complaint, in part, that:

> [D]efendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary,

> advancing age and the stigma of termination for cause.

(Complaint, Paragraph 10, App. H).

This allegation was not contained in the Complaint's prayer for damages, but rather, was one of the charging allegations of Campbell's public policy cause of action. Illustrative of the fact that this was an allegation independently giving rise to damages is that this allegation was not reiterated in connection with any other count of the Complaint. This is of particular significance because Campbell alleged facts in support of his claims for punitive damages in connection with his causes of action for statutory and common law age discrimination, as well as his claim for defamation.

Thus, by the specific charging allegations of Paragraph 10 of Campbell's first claim for relief, Campbell framed an independent damage claim based upon Aerospace's alleged knowledge that its conduct would adversely affect his entitlement to ERISA-covered benefits.[1] Therefore, ERISA preempted Campbell's claims. Accordingly, Aerospace properly removed the action to federal court based upon federal question jurisdiction under 28 U.S.C. §§ 1331 and 1441(b). Aerospace premised removal exclusively upon the allegations of Paragraph 10 of the Complaint. Campbell did not challenge removal at that time.[2]

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1. There is no dispute that the benefits referenced in Paragraph 10 of the Complaint comprise an ERISA-covered plan.

2. Paragraph 10 was not the only reference made in the Complaint to ERISA-covered benefits, although it was the only reference upon which Aerospace premised the existence of federal jurisdiction.

On April 7, 1993, Campbell voluntarily dismissed his claims for statutory and common law age discrimination, and on August 23, 1993, the District Court dismissed Campbell's defamation and public policy claims in response to Aerospace's Motion for Summary Judgment. Thereafter, Campbell filed a motion to remand the action to state court alleging that the District Court lacked jurisdiction to adjudicate his claims. The District Court denied Campbell's motion to remand on the grounds that Paragraph 10 of Campbell's Complaint triggered ERISA preemption which resulted in the existence of federal question jurisdiction. Therefore, removal was proper. The District Court then exercised its discretion under the doctrine of pendent or supplemental jurisdiction and retained jurisdiction over Campbell's contract claims (App. D).

On June 2, 1995, following a trial, the District Court rendered a final Order and Judgment on the merits in favor of Aerospace (App. B and C). In response, Campbell filed a Notice of Appeal.

On September 3, 1997, a divided panel of the Ninth Circuit held that the allegations of Paragraph 10 of Campbell's Complaint did not give rise to ERISA preemption (App. A). In this regard, the Ninth Circuit reversed and remanded the case to the District Court with instructions to remand the case to the Superior Court of the State of California for the County of Los Angeles on the grounds that the District Court lacked jurisdiction to adjudicate Campbell's claims.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRIOR RULINGS THAT A TERMINATION MOTIVATED BY AN EMPLOYER'S DESIRE TO DENY ERISA-COVERED BENEFITS IS PREEMPTED BY ERISA.

A. The Reach of ERISA.

Congress created ERISA in order to promote the uniform and predictable administration of benefits law. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 142 (1990). This statutory design achieves the Congressional goal of encouraging employers to provide benefits to their employees. Without such uniformity, employers who fear regulation by overlapping jurisdictions applying inconsistent standards will likely retreat in their provision of such benefits. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985).

Thus, ERISA's remedies supersede all state law, including state common law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). So complete is ERISA's preemptive reach that the label ascribed to the preempted claim in state court is irrelevant. Indeed, the "well-pleaded complaint" rule, which makes plaintiff the master of his pleadings, is of no defense to ERISA preemption and it is equally of no concern that ERISA does not afford the remedies provided by the preempted state law claim. *Ingersoll-Rand*, 498 U.S. at 145 citing *Russell*, 473 U.S. at 64-67.

Given the expansive scope of ERISA, this Court has

recognized that allegations such as the one made by Campbell in Paragraph 10 of his Complaint are subject to federal jurisdiction because such claims: (1) conflict with § 510 of ERISA; and, alternatively; (2) are preempted by § 514(a) of ERISA. Each of these reasons vested the District Court with jurisdiction over Campbell's lawsuit and the Ninth Circuit erred when it held otherwise. This conflict between the decision of the Ninth Circuit and this Court's prior rulings concerning an issue of exceptional importance, specifically, the scope of ERISA preemption, warrants the granting of this Petition. Supreme Court Rule 10(c).

B. Paragraph 10 Of Campbell's Complaint Seeks To Enforce A Right Recognized Under § 510 Of ERISA.

The Ninth Circuit's decision directly conflicts with this Court's holding in *Ingersoll-Rand*. In *Ingersoll-Rand*, a terminated employee brought a wrongful discharge action in state court against his former employer, alleging that he was terminated because of his employer's desire to avoid paying pension benefits. The employee sought to recover punitive and compensatory damages based on various tort and contract theories, but did not assert any cause of action based on ERISA.

This Court held in *Ingersoll-Rand* that an attempt to enforce under state law any right recognized in § 510 of ERISA "conflicts directly with an ERISA cause of action" and must, therefore, be preempted. *Ingersoll-Rand*, 498 U.S. at 142. This Court further explained in *Ingersoll-Rand* that a state law wrongful discharge claim premised in any part upon an employer's motive to deny ERISA-covered benefits is precisely the type of right protected under § 510 of ERISA:

> By its terms, § 510 protects plan participants from termination motivated by an employer's desire to

> prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits. We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510.

Ingersoll-Rand, 498 U.S. at 143 (internal citations omitted).

Since Campbell alleged as an independent claim in his Complaint that he is entitled to punitive damages by virtue of Aerospace's knowledge that its conduct would deprive Campbell of his retirement benefits, Campbell has expressly placed at-issue Aerospace's motive to deny him ERISA-covered benefits and has, therefore, stated a claim under § 510 of ERISA claim pursuant to *Ingersoll-Rand*. The essence of Campbell's claim is that with this knowledge, Aerospace acted in bad faith to deny Campbell those ERISA-covered benefits to which Campbell was entitled. As noted by the dissenting panelist of the Ninth Circuit, if "ERISA preempts anything, it must preempt an independent claim for punitive damages based on any employer's motive to deny pension benefits." *Campbell*, 123 F.3d at 1316. A contrary holding disregards the elements of a claim for punitive damages.

Motive is an indispensable prerequisite to recover punitive damages. Exemplary damages in California are only available upon proof that "the defendant has been guilty of oppression, fraud or malice." Cal. Civ. Code § 3294(a). Under California law, "oppression" is defined as "despicable conduct . . . in conscious disregard of that person's rights." Cal. Civ. Code § 3294(c)(2). "Fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact." Cal. Civ. Code § 3294(c)(3). Likewise, "malice" means conduct "intended by the defendant to cause injury." Cal. Civ. Code § 3294(c)(1). In

sum, a claim for punitive damages can only arise under California law when "the defendant act[ed] with the intent to vex, injure, or annoy." *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 922, 148 Cal. Rptr. 389, 582 P.2d 980 (1978) (citation omitted).

In the Complaint, Campbell based his independent claim for punitive damages on Aerospace's conduct in terminating his employment knowing that the result would be the loss of pension benefits to Campbell. Contrary to the Ninth Circuit's opinion, this allegation was not simply made "to punctuate" some other wrongful conduct.[3] *Campbell*, 123 F.3d at 1313. Rather, Aerospace's alleged conscious disregard of Campbell's right to pension benefits was the actual wrongful conduct which gave rise to Campbell's claim for punitive damages. By definition, it is an allegation that Aerospace acted by design in terminating Campbell with the knowledge and intent that in doing so, Campbell's ERISA benefits would be lessened. Motive cannot be divorced from this allegation. As such, Paragraph 10 of Campbell's Complaint seeks the enforcement of a right recognized by § 510 of ERISA.

C. As An Action To Enforce A Right Recognized By § 510 Of ERISA, The District Court Had Jurisdiction To Adjudicate Campbell's Claims.

As held by this Court in *Ingersoll-Rand*, because a termination motivated by an employer's desire to avoid paying

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3. Nor did Paragraph 10 describe a mere consequence of Campbell's termination. Instead, Campbell elected to describe the consequences of his termination in Paragraph 9, not paragraph 10, of the Complaint, wherein he alleged: "[a]s a proximate result of defendant's conduct, Campbell has suffered harm, including lost earnings, and other employment benefits." (Complaint, Paragraph 9, App. H.) A similar allegation is contained in Paragraph 39 of the Complaint in support of Campbell's claim for defamation.

ERISA-covered benefits violates § 510 of ERISA, a litigant seeking redress as a result of such conduct must bring a claim under the civil remedies provision of § 510(a) of ERISA:

> Unquestionably, the Texas cause of action purports to provide a remedy for the violation of a right expressly guaranteed by § 510 and exclusively enforced by § 502(a). Accordingly, we hold that when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 510 of ERISA, due regard for the federal enactment requires that state jurisdiction must yield.

Ingersoll-Rand, 498 U.S. at 145 (internal citations omitted).

The jurisdiction of federal courts to adjudicate § 502(a) actions is unambiguous. Section 502(e) of ERISA makes clear that Congress intended to vest federal courts with such authority. For this reason, the Ninth Circuit erred when it concluded that the District Court was devoid of jurisdiction over Campbell's claims.

D. The Allegations Of Paragraph 10 Of Campbell's Complaint "Relate To" ERISA And Are, Therefore, Preempted By § 514(a) of ERISA.

Congress made the preemption of ERISA complete, *Ingersoll-Rand*, 498 U.S. at 142, thereby subjecting to federal jurisdiction any state law claim which "may relate to" any employee benefit plan. ERISA § 514(a), 29 U.S.C. § 1144(a). "The express preemption provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life*, 481 U.S. 41 (1987); *see also FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Shaw v.*

Delta Air Lines, Inc., 463 U.S. 85 (1983). Indeed, § 514(a) of ERISA "is conspicuous for its breadth." *Ingersoll-Rand*, 498 U.S. at 138. Thus, the District Court had jurisdiction to adjudicate Campbell's claims for the alternative reason that Paragraph 10 of the Complaint was subject to ERISA preemption by operation of § 514(a).

In *Ingersoll-Rand*, this Court recognized that § 514(a) of ERISA compels the preemption of a state law wrongful termination claim alleging a benefits defeating motive. Specifically, the Court concluded that such adjudication triggers an inquiry into: (1) the existence of an ERISA plan; and (2) the employer's benefits defeating motive in terminating employment, *Ingersoll-Rand*, 498 U.S. at 140, and, therefore, such allegations "relate to" an ERISA plan within the meaning of § 514(a).

The same considerations which warranted a finding of § 514(a) preemption in *Ingersoll-Rand* exist in this instance. In order to adjudicate Campbell's contention that Aerospace terminated him in malicious disregard of his "right to recover and to build adequate retirement benefits," (Paragraph 10 of Campbell's Complaint (App. H)), a state court would be required to adduce both the existence of Aerospace's ERISA plan and Aerospace's alleged benefits defeating motive in terminating Campbell's employment. In the absence of either element, Campbell could not recover for Aerospace's alleged disregard of his right to pension benefits. Thus, Campbell's state law claim clearly "relates to" an ERISA-covered plan and is, therefore, preempted by § 514(a) of ERISA.

In sum, because Paragraph 10 of Campbell's Complaint alleged a federal statutory right (§ 510 of ERISA), enforceable only by a federal statutory remedy (§ 502(a) of ERISA), which supersedes all state law (§ 514(a) of ERISA), jurisdiction vested

with the District Court by operation of 28 U.S.C. § 1331 (and § 502(e) of ERISA) to adjudicate Campbell's allegation that Aerospace wrongfully terminated him in conscious disregard of his right to pension benefits. The District Court also properly exercised pendent or supplemental jurisdiction to adjudicate Campbell's remaining claims pursuant to 28 U.S.C. § 1367(a). Thus, the judgment entered by the District Court after a trial on the merits was valid and the divided panel of the Ninth Circuit was wrong to remand Campbell's claims to state court to restart the litigation process anew.

By its decision, the Ninth Circuit has opened the door for state court litigants to assert, under a myriad of common law and statutory schemes, a right to recover damages for the bad faith handling of ERISA-covered benefits. This result turns on its head the congressional goal of ensuring the uniformity of pension law by the operation of ERISA's preemption over such claims. Accordingly, Aerospace respectfully asks the Court to grant this Petition in order to review the erroneous decision of the Ninth Circuit.

II.

THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE THE ISSUE OF WHETHER ERISA PERMITS THE RECOVERY OF EXTRA-CONTRACTUAL DAMAGES

This Petition offers the Court a unique opportunity to resolve an issue of exceptional importance which has divided the lower courts. Prior to *Ingersoll-Rand*, the law appeared settled that § 502(a) of ERISA did not permit the recovery of extracontractual damages. Specifically, in *Russell*, 473 U.S. at 134, this Court foreclosed the recovery of extracontractual damages by a claimant seeking to redress alleged violations of

ERISA (under § 409(a)) pursuant to the civil remedies provision of § 502(a)(2). In *Russell*, the Court concluded that the complete absence in § 502(a) of any mention of extracontractual damages demonstrated Congress' deliberate intent not to afford such a remedy:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

Russell, 473 U.S. at 146-47 (citation omitted).[4]

Consistent with this analysis, subsequent courts refused to allow claimants to recover extracontractual damages for the violation of rights recognized by ERISA. Such refusal abruptly changed with this Court's decision in *Ingersoll-Rand*. In *Ingersoll-Rand*, the plaintiff, like Campbell, sought punitive damages against his employer under state law theories of recovery which were preempted by ERISA. At the conclusion of the majority opinion, Justice O'Connor wrote:

> The preceding discussion also responds to the Texas court's attempt to distinguish this case as not one within ERISA's purview . . . . [T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no

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4. While the Court in *Russell* left unresolved the availability of punitive damages under § 502(a)(3) of ERISA, the Court's rationale suggested that neither § 502(a)(2) nor § 502(a)(3) permit the recovery of extracontractual damages.

> answer to a preemption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ingersoll-Rand, 498 U.S. at 145.

This language has created a rift among the lower courts regarding the availability of extracontractual damages under ERISA. Some courts have read the quoted language of *Ingersoll-Rand* as overruling *Russell* and its progeny. In *Blue Cross and Blue Shield v. Lewis*, 753 F. Supp. 345 (N.D. Ala. 1990), the Northern District of Alabama stated:

> [a]ccording to *Ingersoll-Rand*, a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extracontractual, even punitive, damages, that is, if the facts call for such a remedy.

Lewis at 347. *See also International Union, United Auto., Aerospace and Agric. Implement Workers v. Midland Steel Products Co.*, 771 F. Supp. 860, 863 (N.D. Ohio 1991) ("[t]he Supreme Court's holding in *Ingersoll-Rand v. McClendon* . . . conclusively establishes the availability of legal remedies under ERISA."); *Haywood v. Russell Corp.* 584 So. 2d 1291, 1297 (Ala. 1991) ("[t]he Supreme Court, in *Ingersoll-Rand*, has now specifically held that the courts are authorized to award damages, both extracontractual, and even punitive, where the facts support them, even though they are not specifically provided for in ERISA.").

Other courts disagree. In *O'Neil v. Gencorp, Inc.*, 764 F. Supp. 833 (S.D.N.Y. 1991), the Southern District of New York granted a motion to dismiss the plaintiffs' claim for punitive damages for the reason that punitive damages are unavailable as a remedy for breach of fiduciary duty under ERISA. Rejecting the plaintiffs' argument that *Ingersoll-Rand* supported their claim for punitive damages, the Southern District observed:

> Had Justice O'Connor intended, as plaintiffs claim, that [her] analysis of § 510 was overruling the considerable amount of federal case law barring punitive and extracontractual damages under ERISA (particularly the cases which specify that punitive damages are unavailable under § 510), she undoubtedly would have so stated.
>
> Furthermore, since Justice O'Connor's dicta in *Ingersoll-Rand* discusses remedies under § 502(a) generally and are not limited to § 520(a)(3), one would also expect an explanation of the effect on *Russell's* holding that punitive damages are unavailable under § 502(a)(2), as well as a distinction from *Russell's* elaborate rationale for generally excluding punitive damages in ERISA actions.

O'Neil at 834. *See also Gaskell v. Harvard Coop. Soc'y*, 762 F. Supp. 1539, 1544 (D. Mass. 1991) ("[H]ad the Supreme Court intended to expand the realm of potential relief available under ERISA, . . . it would have done so explicitly. Such a departure from precedent likely would not have been accomplished in a single sentence, in dicta, at the close of an opinion focused exclusively on a wholly different issue"); *Monfiletto v. John Hancock Healthplans, Inc.*, Civ. No. 90-5137, 1991 WL 231608, at 2, 1991 U.S. Dist. Lexis 15875, at 5 (E.D. Pa. Oct. 30, 1991).

Moreover, the Eleventh Circuit, in holding that extracontractual damages are not available under § 502(a)(3) of ERISA, explicitly found that such a holding did not conflict with *Ingersoll-Rand*. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), wherein Judge John Minor Wisdom, sitting by designation, explained the *Ingersoll-Rand* dicta as follows:

> The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The Supreme Court is not holding that the specific remedies this plaintiff had sought under state law are necessarily the remedies that will be afforded.

McRae, 920 F.2d at 821.

The lower courts have called upon this Court to put an end to this confused state of affairs:

> Although we do not necessarily subscribe to this or any other explanation of what the Supreme Court might have meant by the *Ingersoll-Rand* dicta, we are not rash enough to believe that the Court intended to overrule settled law in most of the circuits, as well as narrowly limit — if not overrule — its own decision in *Russell* in such an off-hand manner. Of course, we do have a "plain meaning" argument to contend with. And it is possible that Justice O'Connor did intend to limit *Russell* severely. Nevertheless, we think the prudent course is to follow Judge Wisdom in his interpretation. We will continue to doubt the availability of extracontractual damages under ERISA *until a more plausible signal reaches us from above*.

Harsch v. Eisenberg, 956 F.2d 651, 660 (7th Cir. 1992) (emphasis added).

Supreme Court Rule 10(c) recommends the granting of a petition for writ of certiorari to address "an important question of federal law that has not been, but should be, settled by this

Court." Aerospace requests that this Court seize this Petition as the appropriate opportunity to resolve whether ERISA allows the recovery of extracontractual damages and to clarify its holding in *Ingersoll-Rand*.

CONCLUSION

It is of exceptional importance that the congressionally mandated scope of ERISA preemption be respected and applied with consistency. It is equally important for the lower courts to know whether ERISA permits the recovery of extracontractual damages.

In this instance, the District Court properly exercised jurisdiction in adjudicating Campbell's claims. The divided panel of the Ninth Circuit erred when it held otherwise. That decision created an unwarranted exception to ERISA preemption for state law bad faith claims and implicitly sanctioned the recovery of punitive damages for the violation of ERISA's provisions. Accordingly, Aerospace respectfully requests that a Writ of Certiorari be issued to review the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 3, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56007

D.C. No. CV-92-01957-DT(GK)

FRED D. CAMPBELL,

Plaintiff-Appellant,

v.

THE AEROSPACE CORPORATION; ARTHUR J. SCHIEWE,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted October 9, 1996 — Pasadena, California

Filed September 3, 1997

Before: Melvin Brunetti, Stephen S. Trott, and Sidney R. Thomas, Circuit Judges.

Appendix A

Per Curiam Opinion; Partial Concurrence and Partial Dissent by Judge Thomas

SUMMARY

Labor and Employment/ERISA

The court of appeals reversed a judgment of the district couret in part, affirmed in part, and remanded with instructions to remand to the state court. The court held that a state wrongful termination action is not preempted by the Employee Retirement Income Security Act (ERISA) when the loss of employee retirement benefits is relied on in a prayer for punitive damages.

Appellant Fred Campbell was discharged by his employer, appellee Aerospace Corporation. Campbell filed suit in California state court for tortious discharge in violation of public policy and related claims. Campbell alleged he was terminated for "blowing the whistle" on Aerospace's illegal billing of the government. In his prayer for punitive damages, Campbell alleged that Aerospace knew that terminating him after long years of service would negatively affect his retirement benefits.

Aerospace removed the case to federal court and moved for summary judgment. It asserted that Campbell had failed to identify the constitutional or statutory provision which established the public policy allegedly violated. In response, Campbell cited an Aerospace policy which warned employees to comply with the False Claims Act (FCA). The district court granted summary judgment in favor of Aerospace on the tortious discharge claim.

Campbell moved to remand the case to state court. The district court denied the motion, ruling that ERISA required the

matter to remain in federal court. A jury found Aerospace not liable on the related claims.

On appeal, Campbell challenged the district court's subject-matter jurisdiction and presented a state-law theory that established the public policy element. Aerospace responded that (1) because Cambell charged that it intended to deprive him of benefits by terminating him, his claim related to an employee benefit plan and was therefore preempted by ERISA, and (2) the FCA was an alternative source of federal-question jurisdiction.

ERISA supersedes state laws insofar as they *relate to* any employee benefit plan covered by ERISA. Although a state law may relate to a plan even if the law is not specifically designed to affect such plans or the effect is only indirect, the preemptive power of ERISA is not without limit. Congress's intent in passing ERISA was to ensure that plans and plan sponsors would be subject to a uniform body of benefits law.

A state common law cause of action for wrongful discharge is preempted by ERISA when the complaint alleges that the employer had a pension-defeating motive in terminating the employment. Campbell did not claim that his employer's motive in terminating him was the destruction of his retirement benefits, but that the loss of benefits was a consequence of his wrongful termination. There is a discernible and critical difference between an employer who "knows" that the obvious consequences of terminating an employee for whatever cause includes the loss of benefits and one who is "motivated" to terminate an employee for purposes of saving money or destroying the employee's benefits. Campbell's allegation in his claim for punitive damages did not state a cause of action that "relates to" an employee benefit plan.

The conclusion that ERISA did not preempt the claim was inconsistent with Congress's intent in enacting ERISA. The existence of an ERISA plan was irrelevant to Aerospace's action. There was no risk of different state standards governing the same benefits-related conduct, because the conduct — the employer's employment decision — was motivated by independent considerations.

Campbell's citation to the FCA as a source of public policy did not implicate a federal interest sufficiently substantial to confer federal-question jurisdiction. The federal interests at stake militated against allowing a backdoor FCA state claim to form the basis of federal jurisdiction. Such a result would derogate the detailed requirements Congress chose to impose on FCA litigants.

California statutory law established the same public policy element as the FCA and provided an alternative state-law theory to support Campbell's claim.

Judge Thomas concurred in the portion of the opinion concerning the FCA, but dissented in the portion of the opinion concerning ERISA. Judge Thomas reasoned that if ERISA preempts anything, it must preempt an independent claim for punitive damages based on an employer's motive to deny pension benefits.

COUNSEL

Allan F. Grossman, Encino, California, for the plaintiff-appellant.

Patricia A. Ellis, Meserve, Mumper & Hughes, Los Angeles, California, for the defendants-appellees.

Appendix A

OPINION

PER CURIAM:

OVERVIEW

Fred D. Campbell sued his employer, The Aerospace Corporation ("Aerospace"), in state court for wrongful and tortious discharge. The case was removed to federal court on an ERISA preemption theory because his complaint referred in a prayer for punitive damages to a negative impact on his retirement benefits. Campbell did not prevail on any of his causes of action. He appeals, claiming that the district court had no subject matter jurisdiction to hear his case.

To decide Campbell's claim, we must answer two questions. First, does ERISA necessarily preempt a state cause of action involving wrongful discharge where the loss of employee retirement benefits is relied on in a prayer for punitive damages? And second, does Campbell's invocation of federal law as the source of the public policy tortiously violated by his discharge supply federal question jurisdiction? We hold that ERISA did not preempt his causes of action and that the incorporation of the federal False Claims Act into the state-law claims did not confer subject matter jurisdiction. We therefore reverse and remand with instructions to the district court to remand this action to state court.

BACKGROUND

In response to his termination from Aerospace, Campbell brought suit in California state court, alleging six causes of action, including tortious discharge in violation of public policy.

Campbell alleged he "was terminated for 'blowing the whistle' on illegal activity of defendant Aerospace, to wit, illegally billing the U.S. Air Force." The critical allegation at issue here is contained in paragraph 10:

> In doing the acts set forth above, defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary, advancing age and the stigma of termination for cause. . . . Defendants conduct warrants the assessment of punitive damages.

Aerospace contends that because Campbell charges that Aerospace intended to deprive him of benefits by terminating him, his claim "relates to" an employee benefit plan and is therefore preempted by ERISA. Campbell, on the other hand, maintains that this allegation was made only to justify punitive damages, which he sought in order to punish Aerospace for its egregious conduct in terminating him for engaging in protected whistle-blowing activities.

Based on the paragraph 10 allegation, Aerospace removed the case to federal court. Campbell did not challenge removal at that time. The parties stipulated to dismissal of two claims of age discrimination, and Aerospace moved for summary judgment on the remaining claims. In its motion for summary judgment, Aerospace claimed that Campbell failed to specify the source of public policy violated by his termination, an element of his tortious discharge claim. In response, Campbell invoked only

the federal False Claims Act, 31 U.S.C. §§ 3729-3731. The court granted partial summary judgment on Campbell's claims of tortious discharge in violation of public policy and of defamation, leaving the rest for trial.

Campbell then unsuccessfully moved to remand the case to state court. The district court concluded that ERISA required the matter to remain in federal court. The parties tried remaining two claims — breach of implied contract and breach of the implied covenant of good faith and fair dealing — to a jury, which found Aerospace not liable.

Campbell brought this appeal, challenging the district court's subject matter jurisdiction.

STANDARD OF REVIEW

Because Campbell failed to oppose and preserve an objection to removal, we consider on appeal "not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972). We review de novo the existence of federal subject matter jurisdiction. *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995). Whether ERISA preempts state law is a question of law, which we review de novo. *Inland Empire Chapter of Assoc. Gen. Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996).

DISCUSSION

I. ERISA Preemption

The Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. § 1001 et seq., is a

"comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Section 514(a) of ERISA provides that its provisions "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). The parties do not dispute that Aerospace's plan is an ERISA-covered plan. Thus, we must determine whether the state law relied upon in Campbell's complaint "relates to" an employee benefit plan.

The Supreme Court has determined that Congress used the words "relate to" in a broad sense: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference to* such a plan." *Shaw*, 463 U.S. at 97 (emphasis added). Furthermore, a claim alleging termination "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan," 29 U.S.C. § 1140, relates to ERISA. A state law may relate to a plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990).

However, the preemptive power of ERISA is not without limit. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21. Recently, the Court has acknowledged that the terms "relate to" and "connection with" are not sufficiently helpful in determining the limits of ERISA's preemptive powers. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995). "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all

practical purposes preemption would never run its course, for 'really, universally, relations stop nowhere.' " *Id.* (alterations and citations omitted); *see also California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 1997 WL 63013, at *10 (U.S. Feb. 18, 1997) (Scalia, J., concurring) ("The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended — which it is not."). Thus, the Court concluded that "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* The Court has recognized that Congress's intent in passing section 514(a) was:

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction."

Id. (quoting *Ingersoll-Rand*, 498 U.S. at 142) (alterations omitted). With this understanding of the broad but not limitless scope of ERISA preemption and the Court's guidance in directing us to consider the purposes of ERISA, we turn to the application of ERISA preemption to state wrongful termination law.

In determining whether ERISA preempts state common law causes of action for wrongful discharge, both the Supreme Court

and the Ninth Circuit have focused on the employer's alleged motivation in terminating the employee, concluding that a claim is preempted when the complaint alleges that "the employer had a pension-defeating motive in terminating the employment." *Ingersoll-Rand,* 498 U.S. at 140; *see Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1405 (9th Cir. 1988) (no preemption when loss of benefits is not "a motivating factor" behind termination).

In *Ingersoll-Rand,* 498 U.S. at 135-36, the Court confronted whether ERISA preempted a state common law tortious interference in violation of public policy claim where an employee alleged that his employer unlawfully discharged him, four months prior to the vesting of his pension rights, to avoid making contributions to his pension fund. Under the applicable state law, an employee could recover when the principal reason for termination was the employer's desire to avoid contributing to or paying benefits under the pension fund. *Id.* at 140. Thus, the Court recognized that "the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself." *Id.* at 139-40. The Court concluded that "in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment." *Id.* at 140.

The Ninth Circuit has similarly held that the employer's alleged motive in terminating the employee is critical. A claim does not relate to ERISA "when the loss of pension benefits was a *mere consequence of, but not a motivating factor behind,* the termination of benefits." *Ethridge,* 861 F.2d at 1405 (quotation omitted) (emphasis added). In *Ethridge,* the plaintiff

brought a claim for tortious discharge in state court, alleging that he was terminated from his employment in retaliation for his union activities. In his complaint, Ethridge asserted that "the above said wrongful acts of Defendants, w[ere] a substantial factor in causing damage and injury to Plaintiff, including loss of employment and benefits." *Id.* at 1404 (alterations omitted). Relying on the plaintiff's use of the word "benefits," the defendants attempted to remove the case to federal court on the ground of ERISA preemption. We rejected their argument. Ethridge did not claim that his employer's true motivation for discharge was to deprive him of pension rights, but merely alleged that the loss of benefits was a consequence of the tortious discharge. *Id.* at 1405. Therefore, Ethridge's claim for tortious discharge was not preempted simply because he sought to recover lost salary and benefits.

Similarly, in *Karambelas v. Hughes Aircraft Co.*, 992 F.2d 971, 974 (9th Cir. 1993), the plaintiff, former in-house counsel for the defendant, brought a breach of employment contract claim, alleging that his employer terminated him because it needed a scapegoat after a costly legal error. Defendants sought to justify removal by pointing to plaintiff's acknowledgment, in his deposition, that one reason for his termination was probably to avoid the vesting of his pension rights. We rejected this contention, reasoning:

> Here the heart and soul of the complaint is Karambelas' outrage at the fact that he was made a scapegoat . . . . His complaint does mention that he was terminated just before his retirement benefits vested, but that was clearly in the nature of a jeremiad or, at most, a consequence of the scapegoating wrong that was perpetrated upon him.

Id. Again, mention of the loss of benefits as a consequence of termination did not give rise to ERISA preemption where the employer was motivated by other concerns.

On the other hand, and in contrast to *Ethridge* and *Karambelas,* we have held that where the plaintiff's claim or theory alleged that the employer terminated the employee to avoid paying benefits or sought to prevent the discharged employee from obtaining benefits, ERISA preempted the claim. *See, e.g., Tingey v. Pixley-Richard West, Inc.,* 953 F.2d 1124, 1131 (9th Cir. 1992) (wrongful termination claim pre-empted because plaintiff's sole theory was that his employer terminated him to deny him medical insurance benefits after his son was born with spina bifida); *Felton v. Unisource Corp.,* 940 F.2d 503, 507 (9th Cir. 1991) (claim brought under state wrongful termination and state disability discrimination law was preempted because plaintiff alleged that employer fired him to avoid paying his medical insurance benefits after he contracted lung cancer); *Sorosky v. Burroughs Corp.,* 826 F.2d 794, 800 (9th Cir. 1987) (breach of contract/wrongful discharge claim based on theory that employer agreed to provide retirement benefits then sought to prevent acquisition of those benefits was preempted to the extent that it referred to the employee benefit plan).

We recognize that, unlike *Ethridge,* Campbell complained not only that he lost benefits as a consequence of his termination, but that Aerospace knew of this result. We nonetheless conclude that *Ethridge's* holding that a claim does not relate to ERISA when the loss of benefits is a "mere consequence of, but not a motivating factor behind" the termination controls this case. Thus, we focus on Aerospace's alleged motivations in terminating Campbell.

Like Ethridge, Campbell did not claim that his employer's motive in terminating him was the destruction of his retirement benefits, but rather he alleged that the loss of benefits was a consequence of his wrongful termination. The allegation of Aerospace's knowledge does not change the fact that the deprivation of benefits was not Aerospace's motive, but merely a proximate result of the termination. There is a discernible and critical difference between an employer who "knows" that the obvious consequences of terminating an employee for whatever cause include the loss of benefits and one who is "motivated" to terminate an employee for purposes of saving money or destroying the employee's benefits. Thus, Campbell's allegation that Aerospace knew he would lose his benefits as a consequence of his termination, made in his claim for punitive damages, does not state a cause of action that "relates to" an employee benefit plan. The substance of his tortious discharge claim was that Aerospace was motivated by a desire to retaliate for his whistle-blowing. To hold otherwise would be to revive the problem *New York State Conference* tried to eliminate, i.e., a definition so broad that nothing escapes its reach.

We find support for our conclusion in the Fifth Circuit's opinion in *Rozzell v. Security Services, Inc.*, 38 F.3d 819, 822 (5th Cir. 1994). In *Rozzell*, the Fifth Circuit encountered facts similar to those before us and, in a well-reasoned opinion, held that ERISA did not preempt a cause of action alleging willful deprivation of benefits as part of its punitive damages claim because the substance of the claim was limited to state law retaliatory discharge. Rozzell alleged that his employer had wrongfully terminated him in retaliation for pursuing statutory rights guaranteed under the Texas Workers' Compensation Act. Although Rozzell's complaint contained only one state statutory cause of action, the defendants seized upon an allegation, made

in conjunction with a prayer for punitive damages, that the plaintiff was wrongfully terminated " 'to willfully deprive plaintiff of the compensation and benefits of [his] job' " and removed the suit as preempted by ERISA. *Id.* at 821. Invoking the well-pleaded complaint rule and looking past the words contained in the complaint to the substance of the claim alleged, the Fifth Circuit concluded:

> [I]t remains patently clear that the substance of his claim is limited to the state law retaliatory discharge cause of action. He included the word "benefits" in his accusation of the requisite malice for punitive damages, not as a separate claim for relief. Rather, the allegation of lost "benefits" related back to the retaliatory discharge in order to punctuate that wrongful conduct. Therefore, the substance of Rozzell's complaint alleges only one cause of action that is governed exclusively by state law.

Id. at 822. Just as the substance of Rozzell's claim was wrongful termination in retaliation for filing a workers' compensation claim, the substance of Campbell's claim was wrongful termination in retaliation for his whistle-blowing activities. Campbell did not allege that the deprivation of his benefits was in and of itself wrongful or illegal. Like Rozzell, he pointed to Aerospace's knowledge of these consequences "to punctuate that wrongful conduct."

Our conclusion that ERISA does not preempt this claim is consistent with Congress's intent in enacting ERISA. Unlike *Ingersoll-Rand,* in which the state law precluding termination to avoid paying benefits risked subjecting employers to inconsistent substantive standards concerning benefits plans, the

existence of an ERISA plan is irrelevant to the employer's action in the case before us. There is no risk of different state standards governing the same benefits-related conduct, because the conduct at issue here-the employer's employment decisions — is motivated by independent considerations. Thus, federal preemption of causes of action involving state wrongful termination law, where the employer's decisions are motivated by non-ERISA-related interests, would not serve "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw*, 463 U.S. at 90.

ERISA therefore does not preempt Campbell's claims and thereby confer subject matter jurisdiction.

II. The False Claims Act

Aerospace argues that there is an alternative source of federal question jurisdiction: the False Claims Act ("FCA"). In order for a federal district court to assert federal question jurisdiction pursuant to 28 U.S.C. § 1331, the plaintiff's claim must "arise under" federal law. Where state law creates the cause of action, federal jurisdiction may nonetheless be available if "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808-12 (1986); *see also Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 347 n.10 (9th Cir. 1996) ("*Merrell Dow* suggests that even if the federal law incorporated into a state law claim creates a private right of action, the federal interest may still prove insufficiently substantial to confer federal-question jurisdiction.").

Appendix A

To establish a tortious discharge cause of action, a plaintiff must prove as one element that a fundamental public policy exists that is delineated in constitutional or statutory provisions. *Gantt v. Sentry Ins.*, 4 Cal. Rptr. 2d 874, 881-82 (1992). In his complaint, filed in state court, Campbell alleged that Aerospace's actions violated the public policy of California:

> The actions of defendants and each of them violated the public policy of the State of California, to wit, employers must provide employees due process and must follow their own written policies and procedures regarding termination. Furthermore, plaintiff was terminated for "blowing the whistle" on illegal activity of defendant Aerospace, to wit, illegally billing the U.S. Air Force which is funded with taxpayers' money.

Complaint, ¶ 7. Notably, Campbell did not refer either to a specific state statute or to the FCA in his complaint. However, in its Motion for Summary Judgment in the district court, Aerospace asserted that Campbell had failed to identify the constitutional or statutory provision which established the public policy allegedly violated. In response, Campbell cited an Aerospace Policy and Practice Memorandum which warned employees to comply with the FCA and quoted relevant provisions of the FCA. On appeal, Campbell presents a state-law theory, contending that California Labor Code section 1102.5(b) also establishes the public policy element.

We begin our analysis by again noting that the question before the court is not whether removal was proper,[1] but whether

1 If this were the question, the answer clearly would be no. An (Cont'd)

the district court would have had jurisdiction had the case been filed in federal court "in the posture it had at the time of entry of federal judgment." *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994); *see Felton*, 940 F.2d at 507-08. Applying the *Grubbs* rule, we therefore give due consideration to Campbell's reference to the FCA.

Aerospace claims that Campbell, in citing the FCA as the source of public policy, Campbell raised a substantial, disputed question of federal law. We disagree. We hold that Campbell's citation to the FCA did not implicate a federal interest sufficiently substantial to confer federal-question jurisdiction.

We find no compelling federal judicial interest in embracing this case as a federal question. The federal interest in protecting whistleblowers, in order to expose fraud against the government, is sufficiently advanced through the federal scheme. In enacting the FCA, Congress created a very specific private remedy. It

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(Cont'd)
action filed in state court may be removed only if the district court could have exercised jurisdiction over the action if originally filed there. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). In order for a complaint to state a claim "arising under" federal law, it must be clear from the face of the plaintiff's well-pleaded complaint that there is a federal question. Campbell did not allege a specific state or federal theory. In these circumstances, removal would have been improper, because an alternative state-law theory exists — California Labor Code section 1102.5(b). *See Duncan v. Stuetzle*, 76 F.3d 1480, 1486 (9th Cir. 1996) ("[I]f a single state-law based theory of relief can be offered for each of the three causes of action in the complaint, then the exercise of removal jurisdiction was improper."); *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990) ("The fact that an alternative theory of relief exists for each claim alleged in the complaint, one not dependent upon federal law, is itself grounds to defeat federal question jurisdiction.").

carefully established explicit prerequisites to *qui tam* actions, including precise filing requirements. 31 U.S.C. § 3730. Its protection against adverse employment actions extends specifically to employees for their acts "in furtherance of an action under this section." *Id.* § 3730(h). Indeed, to allow a state-law claim to circumvent these requirements and limitations by generically referencing the "public policy" of the FCA would contravene the statute. Thus, the federal interests at stake strongly militate against allowing a backdoor FCA state claim to form the basis of federal jurisdiction. Such a result would derogate the very detailed requirements Congress chose to impose on *qui tam* FCA litigants.

Moreover, Campbell's citation to the federal policy protecting whistleblowers does not alter the fundamental nature of his state-law tort action. Finally, we note that California statutory law establishes the same public policy element as the FCA and provides an alternative state-law theory to support Campbell's case.

We therefore hold that Campbell's incorporation of the FCA as the source of public policy violated did not raise a sufficiently substantial, disputed question of federal law so as to confer federal-question jurisdiction.

CONCLUSION

We conclude that the district court did not have subject matter jurisdiction over Campbell's case. We reverse and remand this case to the district court with instructions to remand it to the Superior Court of the State of California for the County of Los Angeles.

REVERSED and REMANDED WITH INSTRUCTIONS.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I concur with Section II of the majority opinion concerning federal jurisdiction under the False Claims Act, but respectfully dissent from Section I concerning the impact of ERISA and the judgment.

If ERISA preempts anything, it must preempt an independent claim for punitive damages based on an employer's motive to deny pension benefits. ERISA preemptively regulates such an action by making it unlawful to discharge or discriminate against a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled." 29 U.S.C. § 1140. Indeed, ERISA preempts all state law claims founded on alleged improper processing of pension or other plan benefits. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 57 (1987) ("Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by § 514(b)(2)(A), and therefore is preempted by § 514(a)."); *Kanne v. Connecticut Gen. Life Ins. Co.,* 867 F.2d 489, 493 (9th Cir. 1988) (state common law claims arising from improper claims processing are preempted by ERISA, requiring vacation of judgment "insofar as it awards compensatory and punitive damages arising out of the common law claims").

Under California law, punitive damages may only be awarded if the defendant acted with "fraud, oppression or malice." Campbell sought exemplary damages because Aerospace allegedly acted with malice to reduce or deny his pension benefits. As Campbell acknowledged, he made this accusation to "recover punitive damages from the defendant."

Under California law, malice implicates motive. " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." California Civil Code § 3294 (1992).

Federal preemption is ordinarily a federal defense to a plaintiff's suit. However, Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987). Complete preemption occurs when the preemptive force of a law is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 65.

ERISA is a complete preemption statute. *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 138-39 (1990). Congress intended it "to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523 (1981). Specifically, ERISA preempts any law which "relates to" an employee benefit plan covered by ERISA. *Felton v. Unisource Corp.,* 940 F.2d 503, 508-09 (9th Cir. 1991). In a wrongful termination claim, ERISA completely preempts any state law claim which "relates to" an employee benefit plan covered by ERISA. *Ingersoll-Rand,* 451 U.S. at 140; *Metropolitan Life,* 481 U.S. at 67.

To be sure, "[n]o ERISA cause of action lies when the loss of pension benefits was a mere consequence of, but not a motivating factor behind, the termination of benefits." *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1405 (9th Cir. 1988)(quotation and alteration omitted). However, if the

employer is alleged to have a pension-defeating motive in terminating the pension benefit, the cause of action "relates to" an ERISA plan and is preempted. *Ingersoll-Rand,* 498 U.S. at 140.

The allegations which form the basis of Campbell's independent punitive damage claim are founded on Aerospace's improper motive in attempting to minimize or deny his pension benefits. As such, the independent punitive damage claim is subject to ERISA preemption and federal jurisdiction.

Campbell cites *Rozzell v. Security Servs., Inc.,* 38 F.3d 819, 822 (5th Cir. 1994) for the proposition that if only punitive damages are implicated, ERISA does not preempt the state cause of action. However, unlike the plaintiff in *Rozzell,* Campbell's complaint specifically alleged that Aerospace was motivated by a desire to deprive him of pension and employee benefits in its termination decision. When motive is specifically implicated in alleged benefit denial, ERISA preempts. This conclusion is unavoidable in this instance given the broad preemptive force of ERISA. *See Ingersoll-Rand,* 498 U.S. at 140; *Ethridge,* 861 F.2d at 1404.

The majority views Campbell's punitive claim as incidental to his wrongful termination claim, citing *Ethridge* for the proposition that a claim does not relate to ERISA "when the loss of pension benefits was a mere consequence of, but not a motivating factor behind the termination of benefits." *Ethridge,* 861 F.2d at 1405. This may be a plausible construction of Campbell's complaint, but one with which I must respectfully differ. If Campbell had simply used the word "benefits" in the context of his termination claim, as the plaintiff did in *Ethridge,* I would agree. However, Campbell has framed an independent

damage claim based on his employer's motive in denying or reducing his pension benefits. Under his theory, his entitlement to punitive damages was not the proximate result of his alleged wrongful discharge, but rather the manner in which Aerospace treated his pension. Campbell has not retreated from this position, nor attempted to reframe his complaint to align it more closely to *Ethridge*. He truly aims for a jury award based upon Aerospace's alleged improper motives in administering his pension.

When a plaintiff seeks significant additional money damages on a theory founded on manipulation of his pension benefits, his claim rises beyond "mere consequence" and becomes subject to ERISA preemption. Thus, although I might personally prefer the rule espoused by the majority, I cannot in good conscience reconcile it with ERISA's exceptionally broad preemptive language, nor with the Supreme Court's and our construction of it.

In the real world of litigation, Fred Campbell has had his day in court. He was fired for alleged sexual harassment, racism, poor performance and running a consulting business out of his office. He countered with a wrongful termination suit, contending he had, in fact, been terminated for whistleblowing. An investigation revealed, among other matters, that he had printed business cards for his personal consulting business listing his Aerospace telephone number; that office contained virtually no evidence of any work he was performing for Aerospace; that he had improperly touched a number of female employees and made inappropriate sexual remarks; that he had never engaged in any "whistleblowing" until he was suspended as a result of numerous complaints by co-workers; and that no fraud had occurred about which one might rightfully blow a whistle. His

claims were fully aired before the district court, tried to a jury of his peers, and found to be without merit. I suspect the state trial judge may find it ironic that this case is being returned for litigation anew because the plaintiff has alleged an independent punitive claim, even though all the underlying causes of action have been rejected on the merits after thorough consideration.

The majority, in good faith, has reached a different conclusion. However, because I believe the district court was right on all counts and that our precedent compels a different result, I respectfully dissent from Section I of the opinion and the judgment.

APPENDIX B — MEMORANDUM OF DECISION IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA DATED MAY 13, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 92-1957 DT

FRED D. CAMPBELL,

Plaintiff,

vs.

THE AEROSPACE CORPORATION; JEAN BREEDLOVE; ARTHUR J. SCHIEWE; DOES 1-100, inclusive,

Defendants.

MEMORANDUM OF DECISION

The above-entitled matter came on regularly for trial on May 23, 24, 25 and 26, 1995. Timothy V. Milner, Esq. of the law firm of Snyder & Milner represented and appeared for the plaintiff, FRED D. CAMPBELL. Linda M. Lawson, Esq. and Patricia A. Ellis, Esq. of the law firm of Meserve, Mumper & Hughes represented and appeared for the defendant, THE AEROSPACE CORPORATION. All other defendants were previously dismissed.

After considering the pleadings, testimony, exhibits, evidence and arguments of counsel, this Court rules as follows:

1. Judgment in favor of defendant, THE AEROSPACE CORPORATION, as against the plaintiff, FRED D.

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CAMPBELL, on all remaining causes of action as set forth in plaintiff's Complaint. Specifically, this Court finds in favor of defendant on:

a. Breach of implied contract of continued employment. There was no such showing of any such breach. Plaintiff was an at will employee terminated for good cause in that there was substantial evidence presented to the satisfaction of the Court that disclosed a disturbing pattern of sustained complaints of sexual harassment in the work place over a period of time. The Court finds that it was reasonable for defendant to suspend and ultimately terminate plaintiff for cause; and,

b. Breach of the implied covenant of good faith and fair dealing. There was no such showing of any such breach. For the reasons set forth above, the defendant's decision to terminate plaintiff was not pretextual. The Court finds sufficient evidence that good cause existed to suspend and terminate plaintiff for sexual harassment in the work place.

2. Defendant to recover its costs of suit from plaintiff.

3. Defendant to prepare a Judgment in accordance with this Memorandum of Decision.

DATED: MAY 01 1995

s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

Appendix B

I hereby certify that this document was served by First Class mail, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.

_____ _____

DATED DEPUTY CLERK

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA FILED MAY 31, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 92-1957 DT

FRED D. CAMPBELL,

Plaintiff,

vs.

THE AEROSPACE CORPORATION; JEAN BREEDLOVE; ARTHUR J. SCHIEWE; DOES 1 -100, inclusive,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

COURT'S FINDINGS OF FACT

1. THE AEROSPACE CORPORATION ("AEROSPACE") is an independent non-profit California corporation whose central mission is to perform general systems engineering and integration services for military space-related programs and other programs essential to national security.

2. From March 25, 1968 to February 1974 and November 1979 through September 30, 1991, plaintiff was employed by AEROSPACE as a Member of the Technical Staff ("MTS").

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3. At the time plaintiff was terminated from his employment on September 30, 1991, plaintiff's job title was Manager, Level 2, Sensors Section Electro-Optical Systems Department, Engineering and Technology Group.

4. Aerospace has adopted and implemented written Policies and Practices which govern the terms and conditions of employment. Among these policies are those relating to termination of employment, conflicts of interest and sexual harassment.

5. During the course of his employment at AEROSPACE, plaintiff was provided with copies of AEROSPACE's written Policies and Practices.

6. AEROSPACE Policy No. 1-16, entitled, "Employee Conduct-Conflict of Interest," requires each employee, every two (2) years, to make a statement that the employee has read and understands the Company's conflict of interest policies and has no outside business interest. As of February 22, 1990, plaintiff had executed a "Conflict of Interest Certification."

7. AEROSPACE Practice 4 No. 2-35-2, entitled, "Sexual Harassment," provides, in relevant part, as follows: "As part of its commitment to equal employment opportunity, the Company prohibits any form of sexual harassment on the part of employees, and treats sexual harassment as a serious form of illegal discrimination."

8. AEROSPACE Practice 2-35-2, entitled, "Sexual Harassment," provides, in relevant part, as follows: . . . "Any form of sexual harassment is contrary to the Company's commitment to equal employment opportunity. Sexual

harassment will lead to disciplinary action up to and including termination."

9. As part of its ongoing efforts to prohibit any form of sexual harassment from occurring at the work place, AEROSPACE sponsored Sexual Harassment Awareness Programs and required that its managers, including plaintiff, attend. The attendees of the programs were informed of the nature of sexual harassment and the many forms it can take.

10. On or about July 11, 1991, JEAN BREEDLOVE ("BREEDLOVE"), Principal Director, Sensors Systems Subdivision, received a report from an exiting employee that plaintiff, an employee in her subdivision, was sexually harassing female secretaries and female engineers and conducting personal business on Company time.

11. BREEDLOVE conducted preliminary interviews with several female employees with whom plaintiff worked to ascertain whether there appeared to be any merit to the allegations that plaintiff was engaging in acts of sexual harassment and/or that plaintiff was engaged in operating his own business on Company time.

12. BREEDLOVE reported the results of her preliminary investigation to AEROSPACE's Equal Employment Opportunity ("EEO") Office.

13. Since the results of the preliminary investigation revealed that the allegations of plaintiff's misconduct appeared to have merit, on July 16, 1991, plaintiff was suspended without pay pending a complete investigation.

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14. Between July 16, 1991, and August 1, 1991, AEROSPACE conducted a thorough and complete investigation into the allegations of plaintiff's misconduct.

15. As part of the investigation into the allegation of sexual harassment, AEROSPACE interviewed fourteen (14) employees in plaintiff's Department.

16. These personal interviews and inspections revealed that (1) plaintiff had repeatedly made statements of sexual nature causing embarrassment and humiliation to numerous female employees; (2) plaintiff had engaged in unwelcome back, shoulder and/or neck rubs; and (3) plaintiff was actively pursuing personal business matters of a limited nature on AEROSPACE time.

17. Many of the women interviewed stated that they were frightened and intimidated by plaintiff and expressed concern that plaintiff would retaliate against them physically or in a punitive manner because of their participation in the investigation.

18. Personal letterhead, address sheets, invoices and/or business-type cards were discovered in plaintiff's office.

19. Plaintiff and his wife were identified on letterhead as "Engineering & Data Management Consultants" or "Engineering and Information Systems Consultants."

20. Prominently displayed on each business-type card was plaintiff's AEROSPACE telephone and voice mail numbers.

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21. Interviews with several employees who worked in plaintiff's area revealed that plaintiff received telephone calls from his "clients" and counseled them during normal business hours. The employees stated that they were able to overhear these conversations because plaintiff spoke loudly into the telephone, or used the speaker phone, and did not close his door to ensure privacy.

22. An inspection of plaintiff's timecards, office and review of various computer disks, including those used by secretaries who supported plaintiff, raised issues as to the amount of AEROSPACE work performed by plaintiff during the two (2) years he held the position of Manager.

23. Numerous floppy disks identified as "personal" were located in plaintiff's office, as well as numerous entries on hard drive denoting personal files entered into and worked on by plaintiff during core work hours.

24. Pursuant to AEROSPACE's internal grievance process, plaintiff challenged his suspension.

25. In accordance with grievance procedures, AEROSPACE advised plaintiff, in writing, of the specific charges against him, i.e., sexual harassment and conducting personal business on Company time. Plaintiff was also provided with written summaries of the outcome of the investigation conducted by AEROSPACE.

26. In response, plaintiff denied all of the charges against him and submitted a detailed "Response to Allegations of Misconduct" on August 12, 1991.

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27. During this time, AEROSPACE continued its investigation to determine the appropriate course of action to be taken with respect to plaintiff's employment status. As part of this further investigation, AEROSPACE obtained sworn declarations from female employees who had been interviewed regarding the charges of sexual harassment against plaintiff.

28. The female employees expressed concern that plaintiff owned two (2) guns and was a member of the National Rifle Association ("N.R.A."). This concern was expressed to management.

29. Following the completion of the investigation into the allegations of plaintiff's misconduct, AEROSPACE determined that more than sufficient evidence existed to substantiate the charges that plaintiff had engaged in acts of sexual harassment and had conducted personal business on Company time.

30. Notwithstanding the results of the investigations and the conclusion that plaintiff's conduct warranted immediate termination for cause, AEROSPACE attempted to locate an alternative position for plaintiff within the Company.

31. No alternative position could be located where plaintiff would not have interaction with the female employees who had complained of plaintiff's sexual harassment.

32. On September 17, 1991, plaintiff was advised in writing that he was placed on an unpaid leave of absence until September 30, 1991, at which time his employment would be terminated.

33. AEROSPACE further advised plaintiff that it would agree to rescind his termination and allow him to retire effective

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November 1, 1991, should plaintiff choose to accept AEROSPACE's Retirement Incentive Plan ("RIP").

34. Plaintiff declined to accept the RIP and, as a result, his employment with AEROSPACE was terminated for cause effective September 30, 1991.

35. At no time did plaintiff report his "concern" regarding AEROSPACE's inappropriate billing practices to the U.S. Air Force.

36. At no time did plaintiff conduct any investigation to substantiate his "belief" that AEROSPACE was inappropriately billing the U.S. Air Force.

37. At no time during AEROSPACE's investigation into the allegations of plaintiff's misconduct did plaintiff advise management of his "belief" that AEROSPACE was not properly billing the U.S. Air Force.

38. At no time during AEROSPACE's internal grievance process did plaintiff advise management of his "belief" that AEROSPACE was engaged in illegal billing activities.

39. AEROSPACE Policy No. 2-60, entitled, "Termination of Employment," provides that "[a]n involuntary termination may involve . . . a discharge for cause . . ."

40. Plaintiff was charged, and ultimately terminated, for conducting personal business on AEROSPACE time and engaging in sexual harassment.

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41. This Court finds that AEROSPACE had reasonable grounds to conduct an investigation into the allegations that plaintiff had engaged in acts of sexual harassment and had conducted personal business on Company time.

42. The investigation took place over a two (2) month time period and included interviews with numerous percipient witnesses.

43. BREEDLOVE was not a party to the employment contract between AEROSPACE and plaintiff.

44. While this Court has found that AEROSPACE had reasonable grounds to conduct an investigation into the allegations as set forth in paragraph 41, this Court finds that only the charge that plaintiff had engaged in several acts of sexual harassment over a period of time is substantiated by the evidence. The evidence presented to this Court on the issue that plaintiff had conducted personal business on Company time is inconclusive.

45. A Grievance Appeals Board hearing on plaintiff's grievance was convened on September 24, 1991, pursuant to Step 4 of Practice 2-35-1 dated March 3, 1989, entitled, "Employee Grievance Procedure."

46. This Court finds that, after considering all of the information and testimony provided during the grievance procedure and grievance hearing, the Grievance Appeals Board properly concluded that Management of AEROSPACE CORPORATION acted in accordance with Company policies and practices which govern the suspension of plaintiff based upon evidence of sustained complaints of sexual harassment in the work place over a period of time.

47. This Court further finds that plaintiff's ultimate termination for sustained complaints of sexual harassment in the work place over a period of time was proper.

COURT'S CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter of this lawsuit based upon federal question jurisdiction pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 20092, *et seq.*, pursuant to 28 U.S.C. Sections 1331 and 1441(b).

2. AEROSPACE had good cause to terminate plaintiff's employment on the issue of sexual harassment.

3. AEROSPACE acted in good faith in terminating plaintiff's employment.

4. Accordingly, there is no genuine issue as to any material fact remaining and AEROSPACE is entitled to a judgment as a matter of law on all remaining causes of action.

5. Accordingly, there is no genuine issue as to any material fact remaining and AEROSPACE is entitled to a judgment that plaintiff's claim for breach of implied contract of continued employment be dismissed, as a matter of law.

6. Accordingly, there is no genuine issue as to any material fact remaining and AEROSPACE is entitled to a judgment that plaintiff's claim for breach of the implied covenant of good faith and fair dealing be dismissed, as a matter of law.

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7. If any of the foregoing controverted facts are construed to be conclusions of law, the same shall be deemed to be conclusions of law. If any of the foregoing conclusions of law are construed to be uncontroverted facts, the same shall be deemed to be uncontroverted facts.

DATED: MAY 31 1995

s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Court

I hereby certify that this document was served by First Class mail, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.

_____ _____

DATED DEPUTY CLERK

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED OCTOBER 12, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 92-1957-DT (Tx)

FRED D. CAMPBELL

Plaintiff,

vs.

THE AEROSPACE CORPORATION; JEAN BREEDLOVE; ARTHUR J. SCHIEWE; DOES 1-100, INCLUSIVE

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

Background

This action arises out of Fred D. Campbell's ("Plaintiff") suit against the Aerospace Corporation ("Aerospace"), Jean Breedlove, Arthur J. Schiewe, and Does 1-100, Inclusive (collectively, the "Defendants") for wrongful termination.

Plaintiff filed his complaint in California Superior Court on February 25, 1992 alleging: (1) tortious discharge in violation of public policy; (2) beach of implied contract of continued employment; (3) breach of the implied covenant of good faith and fair dealing; (4) age discrimination in violation of California

Government Code Section 12941(a); (5) common law age discrimination; and (6) defamation. Defendant Aerospace removed the action to this Court on March 31, 1992 based on federal question jurisdiction, namely, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

On April 7, 1993 Plaintiff dismissed, with prejudice, his fourth and fifth claims for relief for statutory and common law age discrimination. On August 23, 1993 this Court granted Defendant Aerospace's Motion for Summary Judgment and dismissed Plaintiff's first and sixth claims for relief for tortious discharge in violation of public policy and defamation. The remaining claims are Plaintiff's second and third claims for relief for breach of an implied contract of continued employment and breach of the implied covenant of good faith and fair dealing.

Plaintiff then filed a motion to remand the pending matter to California Superior Court on the grounds that no ERISA issues had been pled or arisen during discovery. This motion is now before this Court.

Discussion

A. Standard

At any time prior to final judgment, the federal court may remand the case to the state court for a defect in removal procedures or for lack of subject matter jurisdiction. 28 U.S.C. § 1447(c). A plaintiff's motion for remand effectively forces the defendant, the party who invoked the federal court's removal jurisdiction, to prove whatever is necessary to support the petition. That is, the plaintiff must prove the existence of

diversity, the amount in controversy, or the federal nature of the claim. *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992).

In ruling on a reward motion, this Court ordinarily determines removability from the complaint as it existed at the time of removal, together with the removal notice. Additionally, this Court, in determining whether to remand the action to state court, must carefully examine Plaintiff's complaint to ascertain whether it was removable due to the existence of a federal question, even though Plaintiff couched his pleading exclusively in terms of state law.

ERISA contains a broad preemption provision. ERISA states that, with some exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. § 1144(a). When a plaintiff brings an action in state court which contains causes of action preempted by ERISA's civil enforcement provisions, the case is removable to federal court. *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987).

B. Removal for Existence of Federal Question

In Defendant Aerospace's Notice of Removal, they asserted that a federal question was in issue pursuant to 28 U.S.C. § 1441(b). Specifically, Aerospace argued that ERISA issues existed as Plaintiff's claims were premised on Aerospace's alleged interference with the attainment of pension and other employment benefits provided to Aerospace employees under an employee benefit plan within the meaning of ERISA. Thus, according to Aerospace, Plaintiff's state law claims were preempted by ERISA.

Appendix D

Plaintiff's motion to remand is premised, however, on the contentions that his Complaint does not state a claim under ERISA and that no ERISA claims have arisen during the course of discovery. However, Plaintiff's Complaint belies this allegation. Plaintiff's Complaint with respect to his first claim for tortious discharge in violation of public policy alleges that "defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary, advancing age and the stigma of termination for cause." (Complaint, p.4). Thus, according to Plaintiff, Defendants acted to deprive Plaintiff of pension and employee benefits through Plaintiff's termination.

No ERISA cause of action lies when the loss of pension benefits is a mere consequence of, but not a motivating factor behind, the termination of benefits. *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1405 (9th Cir. 1988). But while Plaintiff's Complaint primarily mentions lost benefits in the context of damages suffered as a result of the wrongful termination, Plaintiff also alleges that the Defendants' actions in terminating Plaintiff were motivated by a desire to deprive him of pension and employee benefits. This allegation sufficiently states a cause of action under ERISA; ERISA creates a federal cause of action over an employee's claims to recover benefits due him under the terms of the plan. *Clorox v. U.S. Dist. Ct. for N.D. of California,* 779 F.2d 517, 521 (9th Cir. 1985). Thus, although Plaintiff's Complaint is couched in terms of state law, the first cause of action arises under and is preempted by ERISA. As a result, this matter was properly removed to federal court.

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C. Continuing Federal Jurisdiction

This Court is familiar with both the facts and issues in this case. Therefore, at this time, this Court will exercise its discretion and retain jurisdiction to hear all remaining claims.

Accordingly, this Court hereby **DENIES** Plaintiff's Motion to Remand.

IT IS SO ORDERED.

DATED: OCT 12 1993

stamped/DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court

APPENDIX E — NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. SECTION 1441(b) DATED MARCH 31, 1992

LINDA M. LAWSON #77130
PATRICIA A. ELLIS #130044
HELEN DOMANSKY #156119
MESERVE, MUMPER & HUGHES
333 South Hope Street, 35th Floor
Los Angeles, California 90071
Telephone: (213) 620-0300

Attorneys for Defendant
THE AEROSPACE CORPORATION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. _____

NOTICE OF REMOVAL OF ACTION
UNDER 28 U.S.C. SECTION 1441(b)

[Los Angeles Superior Court Case No. YC 010541]

FRED D. CAMPBELL,

Plaintiff,

vs.

THE AEROSPACE CORPORATION; JEAN BREEDLOVE; ARTHUR J. SCHIEWE; DOES 1 - 100, Inclusive,

Defendants.

Appendix E

TO THE DISTRICT COURT OF THE UNITED STATES, CENTRAL DISTRICT OF CALIFORNIA, AND TO PLAINTIFF, FRED D. CAMPBELL, AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 31, 1992, defendant, The Aerospace Corporation ("Aerospace"), contemporaneously with the filing of this Notice, is removing the above-referenced action from the Superior Court of the State of California for the County of Los Angeles to the District Court of the United States. The Removal is based on the following grounds:

1. This action has been removed to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1441(b). This suit is one of a civil nature over which the District Court of the United States has original jurisdiction.

2. This case was initiated against Aerospace in the Superior Court of the State of California for the County of Los Angeles on February 25, 1992. Aerospace received a copy of the Summons and Complaint on or after March 4, 1992. No prior pleading has been served on Aerospace. Aerospace has filed this Notice of Removal of Action within one (1) year of commencement of the action and within thirty (30) days of first having received the Summons and Complaint.

3. This action raises a federal question under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1001, *et seq.*

4. Plaintiff's Complaint is premised upon Aerospace's alleged interference with the attainment of pension and other

employment benefits provided by Aerospace to its employees under an employee benefit plan. Specifically, in the first claim for relief, i.e., "Tortious Discharge in Violation of Public Policy," plaintiff alleges that "defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, [and] would require plaintiff to be without certain benefits . . .". See Complaint, page 4, paragraph 10. Plaintiff specifically requests damages for loss of "employee benefits." See Complaint, page 11, paragraph 1.

5. The pension and other employment benefits to which plaintiff refers throughout the Complaint are embodied in an employee benefit plan provided by Aerospace to its employees. That employee benefit plan is governed by ERISA.

6. Title 29 U.S.C. Section 1003(a) provides that ERISA shall apply to any employee benefit plan which is not excluded under 29 U.S.C. Section 1003(b), if it is established or maintained by any employer engaged in interstate commerce or any industry or activity affecting interstate commerce. Aerospace alleges that it is a corporation engaged in interstate commerce or in activities affecting interstate commerce. The employee benefit plan provided by Aerospace to its employees is not excluded from ERISA coverage under the provisions of 29 U.S.C. Section 1003(b).

7. Title 29 U.S.C. Section 1002(3) defines the term "employee benefit plan" to include an "employee welfare benefit plan" or an "employee pension benefit plan." Title 29 U.S.C. Section 1002(1) defines an "employee welfare benefit plan" to be:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .

Title 29 U.S.C. Section 1002(2)(A) defines an "employee pension benefit plan" and "pension plan" to be:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . that . . . (i) provides retirement income to employees . . .

8. Aerospace alleges that its employee benefit plan is an "employee benefit plan" within the meaning of ERISA since it provides, among other benefits, medical and pension benefits for its employees.

9. Since plaintiff's lawsuit for wrongful discharge is premised upon Aerospace's alleged interference with the attainment of pension rights and other employment benefits under an employee benefit plan, plaintiff's state law claims are preempted by ERISA. *Ingersoll-Rand v. McClendon*, __ U.S. __, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d 39 (1987).

10. Although a complaint which raises only state law claims is not ordinarily removable to federal court based upon a federal

preemption defense to the state laws claims, federal preemption under ERISA falls within an exception to the "well-pleaded complaint" rule because Congress has so "completely preempted" the area of employee benefit plans. As a result, any claims alleging an employer's interference with the attainment of benefits under an ERISA plan ". . . [a]re not only preempted by ERISA but also displaced by ERISA's civil enforcement provisions . . . to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. Section 1441(b)." *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

11. Because plaintiff's lawsuit is one to establish liability and recover damages for an employer's alleged interference with the attainment of pension and other employment benefits under a plan governed by ERISA, the action is a civil one over which this Court has concurrent original jurisdiction pursuant to 29 U.S.C. Section 1132(e)(1). Accordingly, by virtue of the provisions of 28 U.S.C. Section 1441(b), this action may be removed to this Court.

12. This Court may exercise pendent jurisdiction over any state law claims arising from a nucleus of operative fact common to both the state law claim and the ERISA claim. *Nishimoto v. Federman-Bachrach & Associates*, 903 F.2d 709 (9th Cir. 1990); *Sorosky, supra* at 800.

13. Aerospace is informed and believes, and on that basis alleges, that no other defendant, other than itself, has been served with process herein.

14. All of the process, pleadings and orders received by Aerospace are attached as Exhibit "A."

Appendix E

DATED: March 31, 1992

LINDA M. LAWSON
PATRICIA A. ELLIS
HELEN DOMANSKY
MESERVE, MUMPER & HUGHES

s/Patricia A. Ellis
By: Patricia A. Ellis
Attorneys for Defendant
THE AEROSPACE CORPORATION

APPENDIX F — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-56007
CT/AG#: CV-92-01957-DT(GK)

FRED D. CAMPBELL

Plaintiff - Appellant

v.

THE AEROSPACE CORPORATION; ARTHUR J. SCHIEWE

Defendants - Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and remanded with instructions. Costs taxed.

Filed and entered October 22, 1997

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 22, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56007

D.C. No. CV-92-01957-DT(GK)

FRED D. CAMPBELL,

Plaintiff-Appellant,

v.

THE AEROSPACE CORPORATION; ARTHUR J. SCHIEWE,

Defendants-Appellees.

ORDER

Before: BRUNETTI, TROTT, and THOMAS, Circuit Judges.

Judges Brunetti and Trott have voted to deny the petition for rehearing. Judge Thomas voted to grant the petition for rehearing. Judges Brunetti and Trott would deny the suggestion for rehearing en banc. Judge Thomas has voted to grant the suggestion for rehearing en banc.

Appendix G

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The position for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX H — COMPLAINT FOR DAMAGES FOR TORTIOUS DISCHARGE; BAD FAITH DISCHARGE; BREACH OF EMPLOYMENT CONTRACT; AGE DISCRIMINATION; DEFAMATION (CIVIL CODE SECTION 3300, 3333)

WILLIAM G. CORT, ESQ. State Bar No. 50326
DaCORSI AND CORT
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(818) 592-0058

Attorneys for Plaintiff
FRED D. CAMPBELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO.:

FRED D. CAMPBELL,

Plaintiff,

v.

THE AEROSPACE CORPORATION; JEAN BREEDLOVE; ARTHUR J. SCHIEWE; DOES 1 - 100, Inclusive,

Defendants.

COMPLAINT FOR DAMAGES FOR TORTIOUS DISCHARGE; BAD FAITH DISCHARGE; BREACH OF EMPLOYMENT CONTRACT; AGE DISCRIMINATION; DEFAMATION (CIVIL CODE SECTION 3300, 3333)

Appendix H

Plaintiff alleges:

1. Defendant, The Aerospace Corporation (hereinafter "Aerospace") is and at all times mentioned herein, was a non-profit corporation organized and existing under the laws of the State of California with its principal place of business in Los Angeles County, California.

2. Defendant Does 1-100, inclusive were at all times relevant herein employees, agents, and or members of the Board of Directors of defendant Aerospace. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does 1-100, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will pray leave of this court to amend this complaint to allege the true names and capacities when ascertained.

3. Defendants Breedlove and Schiewe were at all times relevant herein, employees and agents of defendant Aerospace and members of defendant Aerospace's management team. Defendant Aerospace consented to, ratified and authorized the acts of defendants Breedlove and Schiewe herein.

4. Plaintiff is informed and believes and thereon alleges, that each of the defendants herein was, at all times relevant to this action, the agent, employee, representing partner or joint venturer of the remaining defendants and was acting within the course and scope of that relationship. Plaintiff is further informed and believes, and thereon alleges, that each of the defendants herein gave consent to, ratified, and authorized the acts alleged herein to each of the remaining defendants.

Appendix H

FIRST CAUSE OF ACTION
(Tortious Discharge in Violation of Public Policy)

5. From March 25, 1968 to February, 1974 and November, 1979 through September 30, 1991, plaintiff was employed by defendant Aerospace as a member of the technical staff.

6. On or about July 16, 1991, plaintiff received Notice of Suspension without pay. On September 17, 1991, plaintiff received notice from defendant Aerospace that he was terminated effective September 30, 1991. Plaintiff did not receive any pay from July 20, 1991, to September 30, 1991. Plaintiff was terminated allegedly for cause while he was still in the process of grieving his suspension pursuant to published Aerospace corporate policy and practice. Plaintiff was furthermore denied access to his personal and professional property and files, which remained on defendant, Aerospace's, property. This property was important to plaintiff's defense of the charges. Some of plaintiff's personal and professional files were also permanently destroyed by defendant, Aerospace. Plaintiff had also made known to other members of management his belief that defendant Aerospace was not properly billing the U.S. Air Force, defendant Aerospace's major client. Defendant, Aerospace, was billing hours to the Air Force that were not properly chargeable to specific programs but were, rather, chargeable to overhead. In addition, the plaintiff had repeatedly and specifically requested additional services and equipment essential to the efficient and effective utilization of the staff that he managed. This support was denied.

7. The actions of defendants and each of them violated the public policy of the State of California, to wit, employers must provide employees due process and must follow their own

written policies and procedures regarding termination. Furthermore, plaintiff was terminated for "blowing the whistle" on illegal activity of defendant Aerospace, to wit, illegally billing the U.S. Air Force which is funded with taxpayers' money.

8. As a proximate result of plaintiff's conduct as described in paragraph 6 above and in violation of public policy as set forth in paragraph 7 above, defendant, Aerospace, terminated plaintiff's employment on September 30, 1991.

9. As a proximite result of defendant's conduct, plaintiff has suffered harm, including lost earnings, and other employment benefits, the cost of seeking new employment and other damages in an amount to be proven at trial.

10. In doing the acts set forth above, defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary, advancing age and the stigma of termination for cause. Defendants further subjected plaintiff to ridicule, shame and embarrassment with regard to fellow employees as plaintiff was escorted out of defendant Aerospace's place of business, was not allowed to remove his personal and professional property from his personal office and was humiliated by defendants in front of his co-workers. The alleged charges against plaintiff were also made known throughout the company, in addition, the defendant management attempted to find substantiation for their original charges and then found additional grounds for dismissal when the original charges were found to be baseless as defendant, Aerospace, chose not to mark the allegations and accompanying

documentation "Company Private" per corporate practice which would restrict it's dissemination to carefully chosen employees investigating the charges. This oppressive conduct was committed by employees, agents, managing agents and the Board of Directors of defendant, Aerospace. Defendants conduct warrants the assessment of punitive damages.

11. Defendant, Aerospace, authorized and ratified the conduct of the officers, employees, agents, managing agents and Board of Directors as alleged in paragraph 10 by retaining the employees, agents, managing agents and Board of Directors and officers after learning of their conduct toward plaintiff and failing and refusing to discipline or reprimand these individuals. The authorization and ratification was by a corporate officer employee, director and/or managing agent of Aerospace.

SECOND CAUSE OF ACTION

(Breach of Implied Contract of Continued Employment)

12. Plaintiff incorporates herein by reference paragraphs 1 through 5 of the first cause of action as if fully set forth herein.

13. Plaintiff received good to excellent performance evaluations, merit increases, raises, and promotions. Plaintiff was assured on numerous occasions that he would not be arbitrarily terminated and relied on the provisions of company written policy and corporate memorandums regarding termination to conclude that plaintiff and defendant, Aerospace, had entered into an implied contract that plaintiff would not be discharged unless there was good cause to do so.

14. Based on the oral representations and promises and conduct of defendant, Aerospace, as set forth in paragraph 13

above, plaintiff had an employment contract with defendant, Aerospace, that he would be employed by defendant, Aerospace, so long as his performance was satisfactory and that defendant, Aerospace, would not discharge or terminate him without good and just cause.

15. The terms of the employment contract included, but were not limited to, the following: Defendant, Aerospace, would not discharge or terminate plaintiff without good cause and fair warning, that any charges for cause would be fairly and objectively investigated and that plaintiff would be guaranteed due process in defending the allegations.

16. Plaintiff, at all times, fulfilled his duties and conditions under the contract and has been ready, willing and able to continue performing them in a competent and satisfactory manner.

17. Notwithstanding the implied promises to terminate the employment contract only for good cause, on or about September 30, 1991, defendant, Aerospace, terminated plaintiff's employment without just cause, failed to provide plaintiff with due process in defending the charges and did not fairly and objectively investigate the allegations against plaintiff.

18. As a proximate result of defendants' breach of the employment contract, plaintiff has suffered and continues to suffer losses in earnings and other employment benefits in an amount to be established at trial.

Appendix H

THIRD CAUSE OF ACTION

(Breach of Covenant, Good Faith, and Fair Dealing)

19. Plaintiff incorporates herein by reference paragraph 1 through 5 of the First Cause of action and paragraphs 13 through 18 of the Second Cause of Action.

20. The Employment Agreement referred to above contained an implied covenant of good faith and fair dealing, which obligated defendant to perform the terms and conditions of the agreement fairly and in good faith and to refrain from doing any act that would prevent or impede plaintiff from performing any or all of the conditions of the contract that he agreed to perform, or any act that would deprive plaintiff of the benefits of the contract.

21. Plaintiff was employed by defendant, Aerospace, for a total period of approximately 17 years, off and on and reasonably relied on the provisions of company policy and memorandum relative to termination. Plaintiff relied on defendant, Aerospace, that it would implement company policy and procedure in terminating plaintiff if good cause existed for plaintiff's termination.

22. Plaintiff performed all the duties and conditions of the employment agreement.

23. Defendants knew that plaintiff had fulfilled all his duties and conditions under the contract.

24. Defendants breached the implied covenant of good faith and fair dealing under the employment agreement by terminating

plaintiff intentionally, maliciously and without probable cause, in bad faith and for reasons extraneous to the contract. In fact, defendants discharged plaintiff, not because of alleged poor performance, and misconduct but because plaintiff had "blown the whistle" on defendant Aerospace's billing policy with regard to time properly chargeable to specific U.S. Air Force programs. Such motives were contrary to public policy and extraneous to the employment relationship and were intended to deprive plaintiff of the benefits thereof.

25. Defendant, Aerospace, further breached the implied covenant of good faith and fair dealing by violating and failing to follow its' own personnel policies by not following time limitations and providing plaintiff due process through the Aerospace grievance procedure. Defendant Aerospace terminated plaintiff prior to the completion of the grievance process and totally failed to properly resolve the issues raised in each of the plaintiff's three grievances.

26. As a proximate result of defendants' breach of the implied covenant of good faith and fair dealing, plaintiff has suffered and continues to suffer losses in earnings and other employment benefits to his damage in an amount to be determined at trial.

FOURTH CAUSE OF ACTION

(Age Discrimination Government Code Section 12941(a))

27. Plaintiff repleads and incorporates herein by reference paragraph 1 through 5 of the First Cause of Action. Plaintiff was over the age of forty years at the time of his discharge.

28. Plaintiff has satisfied all administrative requirements by filing a claim with the Equal Employment Opportunities Commission or the Fair Employment and Housing Commission. Plaintiff has received a right to sue letter less than one year from the date of the filing of this complaint.

29. Plaintiff was terminated from his employment because he was over the age of forty (40) years.

30. As a proximate result of defendants discriminating against plaintiff because of his age he has suffered and continues to suffer loss in earnings and other employment benefits, emotional distress and "front pay" damages. As a further proximate result of defendants discrimination, plaintiff requests attorney's fees pursuant to Government Code Section 12965(b).

FIFTH CAUSE OF ACTION

(Age Discrimination, Common Law, Government Code Section 12993)

31. Plaintiff repleads and incorporates herein paragraphs 27 through 30 of the Fourth Cause of Action.

32. Plaintiff was discriminated against by being terminated from employment because he was over the age of forty (40) years.

SIXTH CAUSE OF ACTION

(Defamation)

33. Plaintiff repleads paragraphs 1 through 5 of the First Cause of Action as if fully set forth herein.

Appendix H

34. On or about July 16, 1991, and for a period to and including September, 1991, defendants spoke and caused to be published the following words of and concerning the plaintiff: "Plaintiff was charged with working during company time on personal business and plaintiff was charged with sexually harassing female co-employees." The words and publications were distributed during the course of an investigation concerning plaintiff's employment. These utterances were not kept company private as is company procedure concerning an investigation of an employee's termination for cause. Furthermore, plaintiff was summarily escorted from the company premises in full view of co-employees on or about July 16, 1991.

35. The words and publications were defamatory per se because they tend to injure plaintiff in his profession by imputing to him dishonesty and sexual harassment of co-employees. Plaintiff was in a managerial position at the time of these allegations, which are unfounded and destroyed plaintiff's ability to effectively manage employees at defendant, Aerospace's place of business.

36. The words and publications were heard and seen by several co-employees whose names are not known to plaintiff.

37. The words and publications were false and have never been proven or substantiated by defendants.

38. As a result of the above-described words and publications, plaintiff has suffered general damages to his reputation in an amount to be proven at trial.

39. As a further proximate of the above-described words and publications, plaintiff has suffered the following special damages, loss of earnings and fringe benefits package from

employment, all to his damage in an amount to be proven at trial.

40. The gravity of the charges was such that the plaintiff was ethically required to inform the counseling center where he performed part-time psychological counseling. As a direct result, plaintiff was terminated from his counseling position to prevent potential compromise of the center's licensing. This termination forced the transfer or termination of several clients with potential compromises of their emotional health. Plaintiff has lost earnings from his counseling position in an amount to be proven at trial.

41. The above-described words and publications were disseminated by the defendants with malice toward plaintiff in that the charges against plaintiff to terminate him for cause were proffered because plaintiff questioned the billing method utilized by defendants in billing the U.S. Air Force. Plaintiff charged that defendants were billing the U.S. Air Force for time that was not properly chargeable to specific Air Force programs. As a result, defendants viewed plaintiff as a "whistle blower" and trouble maker and set upon a course to discredit him in his profession. Plaintiff was humiliated and embarrassed when defendants chose to personally escort him out of defendant Aerospace's place of business without allowing plaintiff to defend himself nor allowing plaintiff to remove his personal and professional property and files from defendant, Aerospace's, place of business. The above-described action by defendants and each of them, justifies an award of punitive damages.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows:

1. For damages for breach of contract according to proof, including lost earnings and other employee benefits, past and future;

2. For compensatory damages according to proof, including lost earnings and other employee benefits, costs of seeking employment and damage for emotional distress, humiliation and mental anguish;

3. For prejudgment interest on lost earnings and benefits at the prevailing legal rate from November 30, 1990;

4. For lost earnings, present, past and future as a marriage, family and child counselor (MFCC) from July 20, 1991;

5. For punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar misconduct;

6. For attorney's fees;

7. For reinstatement to employment;

8. For costs of suit incurred herein by plaintiff;

9. For such other and further relief as the court deems proper.

DATED: February 10, 1992

DaCORSI AND CORT
BY: s/ William G. Cort
WILLIAM G. CORT
Attorneys for Plaintiff
FRED D. CAMPBELL

APPENDIX I — RELEVANT STATUTES

29 U.S.C. § 1132(a)(1)

The Employment Retirement Income Security Act of 1974 at Section 502(a):

> (a) Persons empowered to bring a civil action. A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . .
>
> (e) Jurisdiction. (1) Except for actions under subsection (a)(l)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1140

The Employment Retirement Income Security Act of 1974 at Section 510:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 U.S.C. § 1144(a)

The Employment Retirement Income Security Act of 1974 at Section 514(a):

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede

any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)].

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a)

[I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1441(b)

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Supreme Court, U.S.
FILED
APR 6 1998
OFFICE OF THE CLERK

No. 97-1195

In The

Supreme Court of the United States

October Term, 1997

THE AEROSPACE CORPORATION,

Petitioner,

vs.

FRED D. CAMPBELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Dissatisfied with the questions presented by petitioner, respondent states the question presented is whether the Employee Retirement Income Security Act of 1974 (ERISA), codified as 29 U.S.C. § 1001 *et seq.*, preempts a state common law tort action for wrongful termination of employment in violation of public policy in which the employee alleged he was discharged in retaliation for whistle-blowing activities, and, seeking the ancillary remedies of compensatory and punitive damages, alleged that petitioner knew discharging him would have a negative effect on his retirement benefits.

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STATEMENT OF CASE

Fred D. Campbell ("Campbell") sued his former employer, The Aerospace Corporation ("Aerospace"), in California's state court for wrongful termination of employment. The complaint was pleaded in six counts under alternative tort and contract theories of liability all arising from the same general set of facts. In the first count of the complaint, Campbell pleaded a common law tort cause of action for wrongful termination in violation of public policy, for which he sought the ancillary remedies of compensatory and punitive damages. He alleged Aerospace terminated him in retaliation for "blowing the whistle" on illegal activity of Aerospace, namely, its illegal billing of the United States Air Force. Compensatory damages he sought were alleged in paragraph 9 of the first count. The critical allegations at issue in this case are contained in paragraph 10 of the first count, the paragraph of the complaint in which Campbell sought the assessment of ancillary punitive damages against Aerospace for its oppressive, fraudulent, and malicious conduct toward him in conscious disregard of his rights[1] when it terminated him in retaliation for engaging in protected whistle-blowing activities. Paragraph 10, in pertinent part, provides:

> In doing the acts set forth above, defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary, advancing age and the stigma of termination for cause. . . .

---

1. *See*, California Civil Code § 3294(c)(2), California's punitive damages statute.

> Defendants conduct warrants the assessment of punitive damages.

App. to Pet. for Cert., H-54-55.

Aerospace contended throughout the litigation, and contends before this Court in its petition, that because of the allegations in paragraph 10 of the complaint, Campbell stated an independent claim which "relates to" its covered employee benefits plan and is therefore preempted by ERISA. It is on this theory of preemption that Aerospace bases its contention that federal subject matter jurisdiction was established in this case. This contention prevails if, but only if, ERISA preempts Campbell's state cause of action.

Campbell contends, on the other hand, that the paragraph 10 allegation is parasitic to his common law state claim for wrongful termination and was made to justify the ancillary remedy of punitive damages under state pleading rules, which he sought in order to punish Aerospace for its egregious conduct in terminating him for engaging in protected whistle-blowing activities. As a result, his cause of action is not preempted by ERISA, and thus, the district court lacked federal subject matter jurisdiction over the case.

Based on the paragraph 10 allegation, Aerospace removed the case to federal court on the theory Campbell's action was preempted by ERISA. Campbell did not challenge removal at that time. Soon thereafter the parties stipulated to dismissal of Campbell's two age discrimination counts. Aerospace then moved for summary judgment claiming that Campbell failed to allege the statutory or constitutional public policy violated by his termination. Campbell's opposition identified only the federal False Claims Act, 31 U.S.C. §§ 3729-3721. The court granted, in part, Aerospace's motion, resulting in dismissal of two of

Campbell's theories of liability: (1) tortious discharge in violation of public policy, and (2) defamation; leaving for trial only two alternative theories of liability for wrongful termination of employment under California substantive law: (1) breach of the implied in fact covenant not to discharge except for cause, and (2) breach of the implied in law covenant of good faith and fair dealing.

Following summary judgment, Campbell's motion to remand the action to state court was denied. At the conclusion of a bench trial, the court found Aerospace was not liable and rendered judgment in its favor. Campbell appealed on the sole ground that the district court lacked subject matter jurisdiction over the case. In a published decision, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that the district court lacked subject matter jurisdiction over the case because Campbell's state court claim was not preempted by ERISA, and reversed the judgment with instructions to remand the case to the Superior Court of California for the County of Los Angeles. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308 (1997). The decision of the Ninth Circuit was filed September 3, 1997. On October 22, 1997, the Ninth Circuit denied Aerospace's petition for rehearing and rejected its suggestion for rehearing en banc. Aerospace then filed a petition for writ of certiorari on January 20, 1998, seeking to have this Court accept certiorari to reverse the decision of the Ninth Circuit. Campbell files this respondent's brief to state his reasons why this Court should deny Aerospace's petition.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

Campbell commenced this action in California state court against Aerospace, his former employer, for wrongful discharge in violation of public policy, seeking compensatory and punitive damages. In paragraph 10 of the complaint, the punitive damages paragraph, Campbell alleged:

> In doing the acts set forth above, defendants knew (a) that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, (b) would require plaintiff to be without certain benefits and (c) would make it extremely difficult for plaintiff to obtain [other] employment because of his high salary [at Aerospace], advancing age and the stigma of termination for cause. . . . Defendants conduct warrants the assessment of punitive damages.

App. to Pet. for Cert., H-54-55, lettered parentheses and brackets added.

Aerospace removed the case to federal court on an ERISA preemption theory, contending that because Campbell charged in paragraph 10 of his complaint that Aerospace terminated him intending to deprive him of benefits, he raised an independent claim which "relates to" its covered employee benefit plan and is therefore preempted by ERISA.

Campbell contended throughout this litigation, as well as now before this Court, that referring to the negative effect

termination would have on his retirement benefits did not raise an independent claim for punitive damages which "relates to" Aerospace's "employee benefit plan" within the meaning and purposes of ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a). Rather, his seeking of punitive damages was ancillary or parasitic to his state common law claim for wrongful termination, and thus comes squarely within the purposes and objectives sought to be accomplished by ERISA's preemption provision.

The issue thus presented to the Ninth Circuit was whether ERISA preempts Campbell's state common law action for tortious termination in violation of public policy, wherein he sought the ancillary remedies of compensatory and punitive damages, based in part on the allegation that Aerospace knew terminating him would have a negative impact on his retirement benefits. In a well-reasoned decision, referring to and relying on several of this Court's most recent decisions in ERISA preemption cases, the Ninth Circuit decided that Campbell's action was not preempted and that the district court lacked subject matter jurisdiction. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308 (1997). Aerospace, by its petition, asks this Court to accept certiorari and to decide the same issue differently than the Ninth Circuit. Campbell believes the Ninth Circuit came to the right decision for the right reasons as will be demonstrated hereinafter.

II.

THE BROAD SCOPE OF ERISA PREEMPTION IS NOT WITHOUT LIMIT.

In an effort to define the scope and boundaries of the preemptive reach of § 514(a)[2] of the ERISA statute since its enactment in 1974, this Court has accepted certiorari in, and decided no less than 16 cases.[3] Justice Scalia, stating these same

---

2. Section 514(a) of ERISA provides: "[e]xcept as provided in subsection (b) of this section, the provisions of this [statute] shall supersede any and all *State laws* insofar as they may now or hereafter *relate to* any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). None of the exceptions in subsection (b) is directly at issue in this case. Italics added. Section 514(c)(1), 29 U.S.C. § 1144(c)(1), defines "state law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA preempts state law causes of action as they relate to employee benefit plans. *Rozzell v. Security Services* 38 F.3d 819, 821, n.3 (5th Cir. 1994).

3. *DeBuono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Constr. N. A., Inc.*, __ U.S. __, 117 S. Ct. 832 (1997); *Boggs v. Boggs*, __ U.S. __, 117 S. Ct. 1754 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. __, 115 S. Ct. 1671 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517 (1993); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S .Ct. 478 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107

(Cont'd)

statistics, suggested that these "prior decisions have not succeeded in bringing clarity to the law [regarding ERISA preemption]." *DeBuono v. NYSA-ILA Medical and Clinical Services*, 117 S. Ct. 1747 (1997), J. Scalia, dissenting, at p. 843, bracket added. Campbell suggests, however, that these cases, especially the more recent ones, help demonstrate the correctness of the Ninth Circuit's decision in this case. This is especially true, as one applies this case law to the case at bench, a case concerning state law of general applicability involving a common law tortious termination action in which the only reference to a covered employee benefit plan is an allegation in a paragraph of plaintiff's complaint seeking ancillary punitive damages.

To begin, the Ninth Circuit decision in this matter, *Campbell, supra*, at 1311, acknowledges, as does Campbell, that a number of the United States Supreme Court cases, especially the older cases, have given a broad interpretation to the clause in § 514(a), which provides that any state law, including an action for wrongful termination, is preempted if it "relates to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). These cases hold that § 514(a) is to be read broadly and expansively to reach any state law having a connection with, or reference to, a covered employee benefit plan. Supporting this interpretation the Court has said:

> that the "breadth of [that provision's] preemptive reach is apparent from [its] language," *Shaw, supra*, 463 U.S., at 96, 103 S. Ct., at 2899-2900; that it

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S. Ct. 1542 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 482 U.S. 41, 107 S. Ct. 1549 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895 (1981).

> has a "broad scope," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2388-2389, 85 L. Ed. 2d 728 (1985); and an "expansive sweep" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1552-1553, 95 L. Ed. 2d 39 (1987); and that it is "broadly worded," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S. Ct. 478, 482, 112 L. Ed. 2d 474 (1990), "deliberately expansive," *Pilot Life, supra*, 481 U.S., at 46, 107 S. Ct., at 1552, and "conspicuous for its breadth," *Holliday, supra*, 498 U.S., at 58, 111 S. Ct., at 407." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037.

Moreover, under the above "broad common-sense meaning, a state law may 'relate to' a benefit plan, and thereby be pre-empted even if the law is not specifically designed to affect such plans or the effect is only indirect." *Ingersoll-Rand, supra*, 111 S. Ct., at 483; *Travelers, supra*, 115 S. Ct., at 1676; *District of Columbia, supra*, 113 S. Ct., at 583; *Mackey, supra*, 108 S. Ct., at 2192; *Pilot Life, supra*, 107 S. Ct., at 1553; *see also Alessi, supra*, 101 S. Ct., at 1907.

As the Ninth Circuit decision pointed out, *Campbell, supra*, at 1311-1312, notwithstanding the language of the above cases giving a broad scope and expansive reach to the preemption language of § 514(a), the reach of ERISA is not without limits. To the same effect this Court said: "*Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.*" *Shaw, supra*, 103 S. Ct., at 2901, n.21, italics added; "Notwithstanding its breath, we have recognized limits to ERISA's pre-emption clause." *Ingersoll-Rand, supra*, 111 S. Ct., at 483," citing *Mackey, supra*, 108 S. Ct., at 2182; also see *Mackey, supra*, at 108 S. Ct., at 2192, referring to the *Shaw*

language quoted above; " '[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, *as is the case with many laws of general applicability*.' " *Travelers, supra*, 115 S. Ct., at 1680, italics added, quoting *District of Columbia, supra*, 113 S. Ct. 583, n.1; *see, e.g., Mackey, supra*, 108 S. Ct., at 2190 (holding that ERISA did not preempt a State's generally applicable garnishment statute, even when applied to collect judgments against plan participants); *Fort Halifax Packing Co., supra*, 107 S. Ct., at 2221 (finding no ERISA preemption even though state law required payment of severance benefits because law did not require the establishment or maintenance of an ongoing plan).

Petitioner makes no mention of the limits this Court has placed on the "reach" of ERISA preemption.

III.

CLAIMS OF PREEMPTION ARE PROPERLY ADDRESSED WITH THE STARTING PRESUMPTION THAT CONGRESS DOES NOT INTEND TO SUPPLANT STATE LAW.

Perhaps an even more important limitation to ERISA's broad and expansive preemption reach, brought about by the Court's construction of the literal language of § 514(a), is the recently acknowledged and enunciated *presumption against ERISA preemption*. In *Travelers, supra*, 115 S. Ct. at 1676, this presumption against preemption was directly considered when the Court asked whether ERISA's "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law." The Court in *Travelers* stated this presumption against preemption as follows:

> . . . despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Travelers, supra, 115 S. Ct., at 1676, citations omitted, citing, *Rice v. Santa Fe Elevator Corp.*, 67 S. Ct. 1146, 1152 (1947).

In *DeBuono v. NYSA-ILA Medical and Clinical Services*, 117 S. Ct. 1747 (1997), the Court continued its recent attention to the presumption against preemption that it had examined in *Travelers* and went even further in explaining how the Court decides whether a state law is preempted or is not preempted by ERISA. It stated:

> In *Travelers*, as in our earlier cases, we noted that the literal text of § 514(a) is "clearly expansive." 514 U.S., at 655, 115 S. Ct., at 1677. But we were quite clear in that case that the text could not be read to "extend to the furthest stretch of its indeterminacy, [or] for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." H. James, *Roderick Hudson* xli (New York ed., World's Classics 1980). *Ibid.*
>
> In our earlier ERISA pre-emption cases, it had not been necessary to rely on the expansive character of

> ERISA's literal language in order to find pre-emption because the state laws at issue in those cases had a clear "connection with or reference to," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2899-2900, 77 L. Ed. 2d 490 (1983), ERISA benefit plans. But in *Travelers* we confronted directly the question whether ERISA's "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law." We unequivocally concluded that it did not, and we acknowledged "that our prior attempt[s] to construe the phrase "relate to" d[o] not give us much help drawing the line here." In order to evaluate whether the normal presumption against pre-emption has been overcome in a particular case, *we concluded that we "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.*"

Id. at 1751, citations omitted, italics added; also see, *Dillingham, supra*, 117 S. Ct., at 838.

Thus, this Court has recognized that the broad interpretation given the ERISA preemption provision § 514(a), by the older cases, may no longer be definitive or conclusive when determining whether a state law is preempted or not preempted and should not be "taken to extend to the furthest stretch of its indeterminacy." *Travelers, supra*, 115 S. Ct., at 1677; quoted in *Campbell, supra*, at 1311. Justice Scalia, in his 1997 concurring opinion in *Dillingham, supra*, 117 S. Ct., at 843, put it this way:

> Today's opinion is no more likely than our earlier ones, however, to bring clarity to this field —

> precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned. Our earlier cases sought to apply faithfully the statutory prescription that state laws are pre-empted "insofar as they . . . relate to any employee benefit plan." Hence the many statements, repeated today, to the effect that the ERISA pre-emption provision has a "broad scope," an "expansive sweep," is "broadly worded," "deliberately expansive," and "conspicuous for its breadth." *Ante,* at 837-838. *But applying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.* Accord, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* 514 U.S. __, __, 115 S. Ct. 1671, 1674, 131 L. Ed. 2d 695 (1995). *The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.*

Id., at p. 843, italics added; quoted in part in *Campbell, supra,* at 1311.

These recent cases show a decided movement of thinking away from the older cases where this Court sought to interpret the "relate to" preemption language of ERISA in a broad and comprehensive manner. Rather, this Court's decisions of its last two terms instruct that courts must look to the Congressional "objectives" of ERISA as a guide to the scope of state law that Congress understood or intended would be preempted.

Petitioner makes no mention of this presumption against preemption, or of the standard for evaluating whether the presumption has been overcome in a particular case.

IV.

COURTS MUST LOOK TO CONGRESSIONAL OBJECTIVES IN ENACTING ERISA AS A GUIDE TO THE SCOPE OF STATE LAW THAT CONGRESS UNDERSTOOD OR INTENDED WOULD SURVIVE PREEMPTION.

This Court, in *DeBuono, Dillingham* and *Travelers, supra*, recognized that Congress' objectives in enacting ERISA and its preemption provision was to establish uniform laws to regulate *the administration* of pension funds. Thus, the Court stated:

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Id. at 1677, quoting *Ingersoll-Rand, supra*, 111 S. Ct., at 484; quoted in *Campbell, supra*, at 1312.

As reflected above, it is important to note that in reaching its decision that Campbell's state court wrongful termination action is not preempted by ERISA, the Ninth Circuit's opinion examines, discusses, quotes from, and applies the holdings from two of this Court's most recent ERISA preemption cases, the 1995 *Travelers* decision, Justice Souter speaking for the Court, and the 1997 *Dillingham* decision, Justice Thomas speaking for the Court, with Justice Scalia concurring. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308, 1311-1312. Petitioner

makes no mention of this Court's decisions in *DeBuono*, *Dillingham*, or *Travelers, supra.*

V.

THE EMPLOYER'S ALLEGED MOTIVE IN TERMINATING THE EMPLOYEE IS CRITICAL IN DETERMINING WHETHER THE ACTION IS PREEMPTED BY ERISA.

Recognizing the broad but not limitless scope of ERISA and the Court's guidance and direction to consider the objectives and goals of ERISA, the Ninth Circuit next considered, as does Campbell, the application of ERISA preemption to state wrongful termination law which is the central issue in the case at bench. *Campbell, supra*, at 1312. In determining whether ERISA preempts a state common law action for wrongful discharge seeking ancillary compensatory and punitive damages, both this Court and the Ninth Circuit have focused on the *employer's alleged motivation in terminating the employee*, holding that such an action is preempted when pleaded in the complaint, or during discovery, it becomes apparent that the employer had a pension defeating motive in terminating the employee. *Ingersoll-Rand, supra*, 111 S. Ct., at 483; and *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1405 (9th Cir. 1988) (state court wrongful termination action — no preemption when loss of benefits is not "a motivating factor" behind termination); *Campbell, supra*, at 1312.

In *Ingersoll-Rand,* the plaintiff brought a state common-law tortious termination action in violation of public policy against his former employer based *primarily* on the *employer's desire to avoid making contributions to or paying benefits under his pension fund.* The Court held plaintiff's claim "relates to"

an ERISA covered plan and is therefore preempted. In *Ingersoll-Rand, supra,* 111 S. Ct. at 483, the Court stated:

> Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.
>
> We have no difficulty in concluding that the cause of action which the Texas Supreme Court recognized here — *a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to, or paying benefits under the employee's pension fund "relate[s] to" an ERISA-covered plan within the meaning of § 514(a),* and is therefore pre-empted."

Id. at 483, italics in last para. added; *Campbell, supra,* at 1312.

The Ninth Circuit, in a number of cases, has similarly held that the employer's alleged motive in terminating the employee is critical in determining whether the claim is preempted by ERISA. Thus, a claim does not relate to ERISA "when the loss of pension benefits was a *mere consequence of, but not a motivating factor behind,* the termination of benefits." *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1405 (1988), italics added; *Campbell, supra,* at 1312. In *Ethridge,* the plaintiff brought a claim for tortious discharge in state court, alleging that he was terminated from his employment in retaliation for his union activities. In his complaint, Ethridge alleged "the above said wrongful acts of Defendants, was a substantial factor in causing damage and injury to Plaintiff, including loss of employment and *benefits.*" *Id.* at 1404, italics in original; *Campbell, supra,* at 1312. Relying on plaintiff's use of the

word "benefits" in the damages allegations of the complaint, the defendant removed the case to federal court on the ground of ERISA preemption and then the district court dismissed the complaint. On appeal, the Ninth Circuit rejected defendant's argument that plaintiff's claim was preempted by ERISA. The Ninth Circuit found that Ethridge did not claim that his employer's true motivation for discharge was to deprive him of pension rights, but merely alleged that the loss of benefits was a consequence of or ancillary to his claim of tortious discharge. *Id.* at 1405; *Campbell, supra*, at 1312. Ethridge's claim for tortious discharge was, therefore, not preempted simply because he sought to recover tort damages in the form of lost salary and "benefits." Accordingly, *Ethridge* held: "[N]otwithstanding the strong preemptive force of ERISA, Ethridge's complaint cannot reasonably be read as stating a claim within the scope of ERISA." *Ethridge, supra*, at 1404; *Campbell, supra*, at 1312.

Similarly, in *Karambelas v. Hughes Aircraft Co.*, 992 F.2d 971 (9th Cir. 1993), the complaint did not allege a claim for relief under ERISA, although it did mention Karambelas was terminated just before his retirement benefits vested. *Id.* at 974. At his deposition, plaintiff testified he thought ("probably") that Hughes discharged him for the purpose of avoiding the vesting of his pension rights. Based on that deposition testimony Hughes removed the case to the district court, which then dismissed the case under Federal Rules of Civil Procedure, Rule 12(b)(6). The Ninth Circuit reversed the dismissal with instructions to the district court to remand the action to California state court on the ground the district court lacked jurisdiction over the case. The court based its decision on the finding that the "mere simulacrum of a possible unasserted ERISA claim was insufficient to form the basis for federal jurisdiction." *Id.* at 975; *Campbell, supra*, at 1312-1313. Thus, the mention of the loss of pension benefits as a consequence of the employee's termination did not give rise to ERISA preemption where the

"real" motivation for termination lies elsewhere.[4] The *Karambelas* court held:

> Here the heart and soul of the complaint is Karambelas' outrage at the fact that he was made a scapegoat for an alleged serious legal error committed by outside counsel and by his own boss. His complaint does mention that he was terminated just before his retirement benefits vested, but that was clearly in the nature of a jeremiad or, at most, a consequence of the scapegoating wrong that was perpetrated upon him.

Id. at 974; *Campbell, supra,* at 1313.

Campbell contends that *Ingersoll-Rand, Ethridge, Karambelas*, and numerous other Ninth Circuit cases all stand for a fundamental proposition, that is, where the alleged loss of

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4. Where the employee's wrongful termination action in fact claimed the employee was discharged to avoid paying benefits or to prevent the discharged employee from obtaining benefits, the Ninth Circuit has consistently held ERISA preempted the claim. *See, e.g., Tingey v. Pixley-Richard West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992) (wrongful termination claim preempted because plaintiff's sole theory was that his employer terminated him to deny him medical insurance benefits after his son was born with spina bifida); *Felton v. Unisource Corp.*, 940 F. 2d 503, 507 (9th Cir. 1991) (claim brought under state wrongful termination and state disability discrimination law was preempted because plaintiff alleged that employer fired him to avoid paying his medical insurance benefits after he contracted lung cancer); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987) (breach of contract/wrongful discharge claim based on theory that employer agreed to provide retirement benefits and then sought to prevent employee from acquiring those benefits was preempted to the extent that it referred to the covered employee benefits plan.) *Campbell, supra,* at 1313.

benefits is "a mere consequence of, but not a motivating factor behind" the termination, ERISA does not preempt the action. Accordingly, the *Campbell* court held:

> We nonetheless conclude that *Ethridge's* holding that a claim does not relate to ERISA when the loss of benefits is a "*mere consequence of, but not a motivating factor behind*" the termination[,] controls this case.

Campbell, supra, at 1313, italics added.

Petitioner makes no mention of this "motivating factor" test in its argument for preemption.

VI.

LOSS OF BENEFITS WAS NOT A MOTIVATING FACTOR BEHIND TERMINATION IN THIS CASE.

In the case at bench, the substance or gravamen of Campbell's claim was that he was wrongfully terminated by his former employer in retaliation of his whistle-blowing activities. He did not claim that the motivation for terminating him was Aerospace's desire to avoid paying him retirement benefits or to prevent him from obtaining such benefits. Rather, his mention of loss of retirement benefits in the future was, *at most*, a "mere consequence" of termination. This argument is supported by the fact that Campbell made his allegation of loss of benefits in the punitive damages paragraph of his complaint. His allegation that Aerospace knew that terminating him would negatively impact his retirement benefits was only alleged to satisfy the pleading requirements for punitive damages in California, in that defendant did the alleged wrongful acts with "oppression, fraud, or malice" which conduct is despicable and in "conscious

disregard" of plaintiff's rights. Calif. Civil Code, § 3294(c)(1) and (2). Such allegations do not convert this action into one that "relates to" a covered employee benefit plan which was intended by Congress to be preempted by ERISA. These allegations have nothing to do with the administration of Aerospace's covered employee benefits plan or Aerospace's desire to avoid paying him retirement benefits. The *Campbell* decision put it this way:

> The allegation of Aerospace's knowledge does not change the fact that the deprivation of benefits was not Aerospace's motive, but merely a proximate result of the termination. There is a discernible and critical difference between an employer who "knows" that the obvious consequences of terminating an employee for whatever cause include the loss of benefits and one who is "motivated" to terminate an employee for purposes of saving money or destroying the employee's benefits. Thus, Campbell's allegation that Aerospace knew he would lose his benefits as a consequence of his termination, made in his claim for punitive damages, does not state a cause of action that "relates to" an employee benefit plan. The substance of his tortious discharge claim was that Aerospace was motivated by a desire to retaliate for his whistle-blowing. To hold otherwise would be to revive the problem *New York State Conference* [*Travelers*] tried to eliminate, i.e., a definition so broad that nothing escapes its reach.

Campbell, supra, at 1313, bracket added.

This argument is also supported by the well reasoned Fifth Circuit Court of Appeals decision in *Rozzell v. Security Services, Inc.*, 38 F.3d 819 (5th Cir. 1994); *Campbell, supra,* 1313-1314.

Rozzell raised similar issues of ERISA preemption of a state court action where plaintiff alleged that his former employer had terminated him in retaliation for filing a workers' compensation claim against it. Defendant employer removed the case to federal court on the grounds that the complaint contained a claim implicating ERISA. Defendant's theory of preemption was based on an allegation in paragraph 8 in the complaint where plaintiff alleged that he was wrongfully terminated "to *willfully deprive plaintiff* of the compensation and *benefits* of [his] job." *Id.* at 821. Defendant contended that this allegation converted what would be ordinarily a state cause of action for tortious termination into a federal claim under the purview of ERISA and thus removable. Plaintiff's motion to remand was denied based on a finding by the district court that determination of plaintiff's damages necessitated reference to defendant's ERISA plan. Therefore, plaintiff's claim was necessarily federal in character and preempted by ERISA since it "relates to" an employee benefit plan. Following a bench trial held on the merits, the court rendered judgment for defendant employer and plaintiff appealed.

The Fifth Circuit vacated the judgment for defendant and remanded the matter to the district court with instructions to remand the case to the state court from which it had been removed. The court so ruled because it found the district court was without federal subject matter jurisdiction over the case because plaintiff's state court claim for tortious termination was not preempted by ERISA. *Rozzell, supra*, at 823; *Campbell, supra*, at 1313-1314.

In *Rozzell*, as in the case at bench, defendant employer argued, and the district court agreed, that plaintiff's punitive damages allegations that he was terminated in a willful attempt by defendant to deprive him of his "benefits" implicated ERISA preemption sufficient to warrant vesting the district court with

federal court jurisdiction. The Fifth Circuit disagreed. First, it noted that under the Supreme Court's decision in *Franchise Tax Board of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 103 S. Ct. 2841 (1983), using the "well-pleaded complaint" rule and its corollary the "artful pleading" rule, the court will look past the words in the complaint to the "substance" of the claim alleged. *Rozzell, supra*, at p. 822. The *Rozzell* court stated that viewed from that perspective, it was "patently clear" that the "substance" of plaintiff's complaint was limited to a state law retaliatory discharge cause of action. The allegation referring to "benefits" was used by plaintiff only in his accusation of the requisite malice necessary under state law to plead a request for the assessment of punitive damages, and not as a separate independent claim for relief. The allegation of lost "benefits" merely related back to the retaliatory discharge "in order to punctuate that wrongful conduct." *Id.* at 822; *Campbell, supra*, at 1313-1314. *The allegation of lost "benefits" was merely an element of damages ancillary to a cause of action for wrongful discharge and was not an independent claim. Id.* at 823; *Campbell, supra*, at 1313-1314. The *Rozzell* court held, looking to the substance of the complaint, that it alleges only one cause of action, i.e., wrongful termination for retaliatory discharge governed exclusively by state law. *Id.* at 822-823; *Campbell, supra*, at 1313-1314. Thus, the *Rozzell* court concluded:

> [it] remains patently clear that the substance of his [discharged employee] claim is limited to the state law retaliatory discharge cause of action. He included the word "benefits" in his accusation of the requisite malice for punitive damages, not as a separate claim for relief. Rather, the allegation of lost "benefits" related back to the retaliatory discharge in order to punctuate that wrongful conduct. Therefore, the substance of Rozzell's complaint alleges only one

> cause of action that is governed exclusively by state law.

Id. at 822; *Campbell, supra*, at 1314, bracket added.

The Fifth Circuit's analysis of similar allegations in the complaint in *Rozzell* is precisely the position of the Ninth Circuit and the same argument Campbell makes in the case at bench. The only difference between the Campbell complaint and the Rozzell complaint is that the term "benefits" referred to in *Rozzell* is referred to as "retirement benefits" in *Campbell*; otherwise the two cases are essentially the same. In order to plead the requisite elements of oppression or malice under California Civil Code § 3294, paragraph 10 of Campbell's complaint alleges that Aerospace knew Campbell would be deprived of retirement benefits by the retaliatory discharge. Such allegations merely "punctuate" the claim of wrongful discharge due to his "whistle-blower" activities, and are parasitic to the state common law action, not a separate or independent claim that "relates to" Aerospace's covered employee benefit plan. Thus, according to *Rozzell*, ERISA does not preempt plaintiff's state court action and the case cannot be removed to the district court because it would lack federal jurisdiction. *Id.* at 822-823; *Campbell, supra*, at 1314.

VII.

CAMPBELL'S CLAIM IS NOT PREEMPTED AND THE DISTRICT COURT LACKED FEDERAL JURISDICTION.

In summary, all of the foregoing amply supports the Ninth Circuit's decision in this case that Campbell's state court common law tort action for wrongful termination is not preempted, since it meets "the objectives of the ERISA statute

as a guide to the scope of the state law that Congress understood would survive." *DeBuono, supra*, at 1751. Petitioner relies heavily on *Ingersoll-Rand* in support of its petition before this Court, but *Ingersoll-Rand* does not favor Aerospace. In *Ingersoll-Rand*, the employee alleged he was wrongfully terminated "because of the employer's desire to avoid contributing to, or paying benefits under the employee's pension fund" (*Ingersoll-Rand, supra*, at 483), and such allegations subjected employers to inconsistent standards concerning benefit plans. In *Campbell*, the Ninth Circuit correctly concluded that the existence of an ERISA plan was irrelevant to the employer's termination of Campbell. *Campbell, supra*, at 1314. In *Campbell*, the Court held:

> There is no risk of different state standards governing the same benefits-related conduct, because the conduct at issue here — the employer's employment decisions — is motivated by independent considerations. Thus, federal preemption of causes of action involving state wrongful termination law, where the employer's decisions are motivated by non-ERISA-related interests, would not serve "to promote the interests of employees and their beneficiaries in employee benefit plans."

Campbell, supra, at 1314, citing *Shaw*, 463 U.S. at 90.

Campbell's action was not preempted by ERISA and the federal court lacked subject matter jurisdiction over it.

CONCLUSION

For all of the foregoing reasons respondent respectfully prays the petition for writ of certiorari be denied.

Respectfully submitted,

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